86 1894

Supreme Court, U.S.
FILED
MAY 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1986

DONALD A. BARTON,

Petitioner,

v.

E.F. HUTTON & CO., INC.; KURT FESHBACH; STOCKBRIDGE PARTNERS, INC.; RICHARD JACOBY; HAIM PEKELIS; SHEARSON-AMERICAN EXPRESS, INC.; GOLDMAN SACHS & CO.; and DONALDSON, LUFKIN & JENRETTE SECURITIES CORP.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HAIGHT, DICKSON, BROWN & BONESTEEL,
ROY G. WEATHERUP, and
ROBERT L. KAUFMAN
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406
Telephone: (213) 458-1000

Attorneys for Petitioner
DONALD A. BARTON

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTION PRESENTED

This petition for writ of certiorari presents but one question for review, which can be framed as follows:

> On an appeal from a district court's hybrid order providing for reimbursement of costs and attorneys' fees under Rule 41(a)(2) of the *Federal Rules of Civil Procedure* to be paid by litigants and their counsel, and also for sanctions under Rule 11 against one counsel which *includes* the reimbursement amount, can a court of appeal affirm the award of sanctions, yet hold that it has no jurisdiction to hear the appeal on the reimbursement, where the appellate court's affirmance of the sanction award also necessarily affirms the propriety of the reimbursement award, to the legal prejudice of those attempting to appeal solely from the Rule 41(a)(2) reimbursement condition?

LIST OF PARTIES

In the proceeding before the United States District Court for the Central District of California, the parties were: plaintiffs Unioil, Inc., Melvin Lloyd Richards, Heck & Heck, Inc., Heck Oil, Inc., and Mark Zelezny; and defendants E. F. Hutton & Co., Inc., Kurt Feshbach, Stockbridge Partners, Inc., Richard Jacoby, Haim Pekelis, Shearson-American Express, Inc., Oppenheimer & Co., Inc., Goldman Sachs & Co., and Donaldson, Lufkin & Jenrette Securities Corporation.

On appeal to the Ninth Circuit, the appellants from the district court's orders were the law firm of Alioto & Alioto, plaintiffs Mark Zelezny, Heck Oil, Inc., Heck

& Heck, Inc., and attorney Donald A. Barton. Plaintiffs Unioil and Richards, and defendant Goldman Sachs & Co., did not take part in the appeal to the Ninth Circuit, nor or they parties to this writ proceeding.

TOPICAL INDEX

Page

Opinion Below 2

Jurisdiction 2

Statutes Involved 3

Statement Of The Case 5

Argument 9

I.

This Court Should Grant Certiorari Because This Case Presents an Important Issue of Law: Where Orders Against Several Litigants or Counsel Under Rule 41(a)(2) Providing for Reimbursements Are Linked to a Sanctions Award Under Rule 11 Against One Counsel, Should Those Bound by the Rule 41(a)(2) Award be Able to Appeal that Award Alongside the Appeal from the Rule 11 Sanctions in Order to Avoid the Clear and Irrevocable Legal Prejudice of Having the Appellate Court Make a Final Determination of Their Rights without Providing Them an Opportunity to be Heard? 11

II.

Conclusion 15

Appendix A A1

Appendix B B1

Appendix C C1

Appendix D D1

TABLE OF AUTHORITIES CITED

Cases Page

Coursen v. A.H. Robins Co., 764 F.2d 1329 (9th Cir. 1985), *corrected*, 773 F.2d 1049 (9th Cir. 1985) 12, 13
LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976) 12, 13
Unioil, Inc. v. E. F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986) 1-2, 15
Yoffe v. Keller Industries, Inc., 580 F.2d 126 (5th Cir. 1978) *rehearing denied,* 582 F.2d 982 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979)..... 13

Statutes

15 United States Code
§15 2
§78A 2
28 United States Code
§1254(1) 3
§1291 ..... 2, 4

Rules

Federal Rules of Civil Procedure
Rule 11 ..... 3, 5, 7, 8, 9, 10, 11, 14
Rule 41(a)(2) ..... passim
Local Rules for the Central District of California
Rule 18.2 7

No. _____

In the Supreme Court of the United States

October Term, 1986

DONALD A. BARTON,

Petitioner,

v.

E.F. HUTTON & CO., INC.; KURT FESHBACH; STOCK-BRIDGE PARTNERS, INC.; RICHARD JACOBY; HAIM PEKELIS; SHEARSON-AMERICAN EXPRESS, INC.; GOLDMAN SACHS & CO.; and DONALDSON, LUFKIN & JENRETTE SECURITIES CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Donald A. Barton, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, as modified and reported as *Unioil,*

Inc. v. E. F. Hutton & Co., Inc., 809 F.2d 548 (9th Cir. 1986), and entered on February 26, 1987.

OPINION BELOW

The original opinion of the Ninth Circuit Court of Appeal was filed on October 15, 1986. Following denial of the petition for rehearing and a suggestion for hearing en banc, the court filed the opinion, with modifications not pertinent to this petition, on February 26, 1987. That opinion is reprinted as appendix A (hereinafter Appendix A). There are three orders of the district court pertinent to this petition: The court's memorandum of decision filed November 21, 1984 (Appendix B); its order filed January 16, 1985 (Appendix C); and its order filed June 6, 1985 (Appendix D). The district court's memorandum of decision and orders are not published.

JURISDICTION

The United States District Court, Central District of California, properly had subject matter jurisdiction over the action below, by virtue of the complaint, pursuant to the Securities Exchange Act, 15 U.S.C., section 78A, and the Clayton Act, 15 U.S.C. section 15.

The Ninth Circuit Court of Appeals held that it had no jurisdiction to hear the appeal from the award of reimbursements under Rule 41(a)(2) of the *Federal Rules of Civil Procedure*. Petitioner Mr. Barton respectfully contends that there are two bases for jurisdiction in the Ninth Circuit. First, because the order by the District Court combined Rule 41(a)(2) reimbursements with Rule 11 sanction, that order constitutes a final determination of the rights of attorney Barton, as will be discussed below, and is thus a final order appealable under 28 U.S.C. section 1291. In the alternative, the Ninth Circuit had jurisdiction because the framing of the reimburse-

ment award in conjunction with the sanction award against Alioto & Alioto, which was clearly appealable, created clear legal prejudice to Mr. Barton in that it left the door open for the Ninth Circuit to affirm the combination order in its entirety, without a clear opportunity for Mr. Barton to be heard absent an appeal, which actually happened in this case. The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Three statutes are involved in this petition for writ of certiorari. The first is Rule 41(a)(2) of the *Federal Rules of Civil Procedure*, relating to voluntary dismissal, which provides as follows:

> "(2) By Order of Court. Except as provided in paragraph (1) of this subdivision, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

The second pertinent statute is Rule 11 of the *Federal Rules of Civil Procedure*, which, in pertinent part, is as follows:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be

> signed by at least one attorney of record in his individual name, whose address shall be stated . . . . The signature of an attorney or a party constitutes a certificate by him that he has read the pleading, motion, or other papers; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or the needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

The third statute is 28 U.S.C., section 1291, relating to final decisions of district courts, which provides in pertinent part as follows:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final

decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

After a request for voluntary dismissal of the class action claims in this case was filed, the defendants moved for reimbursement of costs and attorneys' fees under Rule 41(a)(2) of the *Federal Rules of Civil Procedure*, and for sanctions under Rule 11. The district court eventually filed a unique hybrid order specifying that those plaintiffs seeking voluntary dismissal, along with their counsel, were required, as a condition for voluntary dismissal, to reimburse the defendants for costs, expenses, and attorneys' fees in the amount of $165,774.84. The court further imposed an award of sanctions under Rule 11 against the law firm of Alioto & Alioto ("Alioto"), alone, in the amount of $294,141.10. The award of Rule 11 sanctions included within it the reimbursement award. The order provided that Alioto, alone, was to pay the defendants the entire $294,141.10 within thirty days; that amount was to be reduced by any reimbursement received by the defendants during that time pursuant to the reimbursement award under Rule 41(a)(2). The order provided that in case of disagreement amongst the plaintiffs and their counsel, the apportionment would be determined before a federal Magistrate. [App. A: A6-A7; App. D.] The district court's order arose out of the following chain of events.

Unioil is an oil and gas exploration and production company. Following a rise in 1983 of the price of Unioil's publicly traded stock from $1.25 per share to $13.75

per share, the price of the stock declined to approximately $10.00 per share at the beginning of February, 1984. On February 7, 1984, an article written by Mr. R. Foster Winans was printed in the *Wall Street Journal.* The article questioned the accuracy of Unioil's public announcements, and stated that earlier in his career Mr. Melvin Lloyd Richards, Unioil's president, had twice been cited by the Securities and Exchange Commission for making false and misleading statements. The article suggested that Unioil was being investigated by the SEC, and that its stock was being traded at much higher than its true value. Following publication of this article, Unioil's stock plunged to $2.625 per share, and as of November 1984 the stock was trading at approximately $3.00 per share. [App. A: A2-A3; App. B: B2.]

The Heck Companies, and Mark Zelezny, a stockbroker, owned Unioil shares. In March of 1984, a complaint was filed in the U.S. District Court for the Central District of California, naming as plaintiffs Unioil, Richards, the Heck companies and Zelezny. The Alioto firm and Mr. Barton were their counsel in this action. The action was framed as a class action, with the Heck companies and Zelezny named as representatives of a class of all other Unioil shareholders. The complaint alleged that the defendants, who were individuals and various brokerage houses, engaged in a concerted scheme to sell Unioil stock short in violation of federal antitrust and securities laws, the RICO Act, and California law. The complaint alleged that the defendants had manipulated not only the stock prices, but the Wall Street Journal article as well.

After the complaint was filed, the defendants promptly filed motions to dismiss. Among the bases offered for dismissal were the plaintiff's alleged failure to comply

with the class action pleading requirements of Rule 18.2 of the Local Rules for the Central District of California.[1] The defendants initiated expedited discovery as to class certification and served extensive requests for documents upon the plaintiffs.

In mid-April, three other Unioil shareholder class actions were filed naming Unioil and Richards as defendants. On May 15, 1984, less than one month after these complaints were filed, a notice of voluntary dismissal was filed in the action. The defendants objected to the form of the notice, whereupon the plaintiffs filed a motion for a court approval of their voluntary dismissal under Rule 41(a)(2) of the *Federal Rules of Civil Procedure,* on May 24, 1984. This was only two months after the original complaint in the action was filed. The defendants objected to the form of the motion for withdrawal, and moved for reimbursements under Rule 41(a)(2) and sanctions against both the plaintiffs and their counsel under Rule 11. Plaintiffs Unioil and Richards subsequently filed a withdrawal from the motion asking the district court's approval of the dismissal.

After the hearing on the voluntary dismissal and the defendants' request for sanctions, the district court issued its memorandum of decision on November 21, 1984. The court granted the motion for approval of dismissal upon condition of reimbursement to the defendants of costs, expenses, and attorneys' fees. The reimbursements were to be paid by the remaining plaintiffs, the Alioto firm, and Mr. Barton. Further, the court granted the defendants' motions for Rule 11 sanctions. The court also imposed Rule 11 sanctions of attorneys' fees and costs against Alioto. [App. A: A6-A7.]

---

[1]The motions to dismiss were never heard by the court.

Alioto moved the court to reconsider its order, and that motion was denied in the court's order dated January 14, 1985. [App. C.] After referring the determination of amounts of the reimbursements and sanctions to a magistrate, the court issued its order of June 6, 1985. [App. D.] The court's order was unique in that the reimbursements under Rule 41(a)(2) were linked to the Rule 11 sanctions. The remaining plaintiffs and their counsel were to pay $165,774.84 to the defendants as a condition for voluntary dismissal of the class action claims. Sanctions of $294,141.10 were levied against Alioto. The order provided that Alioto was to pay the defendants the entire amount of the sanctions award, but that the amount was to be reduced by any reimbursement received by the defendants during that period under the Rule 41(a)(2) reimbursement condition. In the event of disagreement amongst Alioto, the plaintiffs, or Mr. Barton, Alioto was to pay the entire amount of the Rule 11 sanctions, and the apportionment would be determined in hearings before a magistrate. [App. D: D2-D3.]

Appeals were taken by Alioto, by the remaining plaintiffs, and by Mr. Barton to the Ninth Circuit Court of Appeals from both the Rule 11 sanctions award and the reimbursement award. In spite of the unique framework of the district court's order wherein the reimbursement award was subsumed within the sanctions award against Alioto, the Ninth Circuit held that the reimbursement portion of the order was not appealable. The court went on to affirm in its entirety the Rule 11 sanction award against the Alioto firm.

All of the appellants have now filed petitions with this court for a writ of certiorari to the Ninth Circuit.

ARGUMENT

Petitioner Donald A. Barton respectfully submits that this case presents important questions regarding the proper application of Rule 11 and Rule 41(a)(2) of the *Federal Rules of Civil Procedure*. The district court's order combining awards under provisions of both rules necessarily caused direct legal prejudice to Mr. Barton by permitting a final determination of his rights without providing him an opportunity to be heard on appeal. Because the Ninth Circuit opinion is published, other district courts are likely to fashion combination remedies like those of the court in this case, to the detriment of litigants and counsel who will have such reimbursements assessed against them, and who will have those reimbursement awards affirmed on appeal without any opportunity to be heard. Further, hybrid orders of the type in this case blur the line between reimbursements under Rule 41(a)(2) and Rule 11 sanctions. The inevitable result is that the standard of review for Rule 11 sanctions will be applied to reimbursements under Rule 41(a)(2).

In their petition for writ of certiorari, the Alioto firm and the plaintiffs have raised important issues regarding the harmful confusion in the circuits relating to Rule 11, and the unjust application of Rule 11 sanctions in this case. Petitioner respectfully submits that yet another matter of concern to this court raised in this case is the manner in which the reimbursement award was linked to the Rule 11 sanctions by the district court, and then improperly found to be nonappealable by the Ninth Circuit.

Because the Ninth Circuit incorrectly held that it had no jurisdiction to hear this appeal, Mr. Barton can only raise the sole procedural question respecting appealability in this petition. However, petitioner wishes to

emphasize that he does not concede that the Ninth Circuit properly decided on the merits in the Alioto firm's appeal. The opinion is flawed both factually and legally. The opinion will inevitably cast a severe chill on the rights of litigants seeking access to courts and the rights of their counsel to advocate vigorously on their behalf, because it plunges the federal judiciary, litigants, and counsel deeper into the confusion surrounding the proper application of Rule 11. Accordingly, the issues presented by the Alioto firm in their petition are of great national importance, and merit consideration by this court. Petitioner adopts the arguments of the Alioto firm on the need for a just and consistent application of Rule 11, and joins in their position on the merits.[2]

Unless this court acts, Rule 11 will continue to be a loose cannon in the federal judiciary, and those like Mr. Barton who have their fortunes tied to Rule 11 orders through an ostensible award of Rule 41(a)(2) reimbursements will have their rights decided on appeal with no opportunity to be heard, in denial of fundamental due process requirements.

---

[2]Petitioner respectfully requests that should both petitions be granted, they be heard together.

I.

This Court Should Grant Certiorari Because This Case Presents an Important Issue of Law: Where Orders Against Several Litigants or Counsel Under Rule 41(a)(2) Providing for Reimbursements Are Linked to a Sanctions Award Under Rule 11 Against One Counsel, Should Those Bound by the Rule 41(a)(2) Award be Able to Appeal that Award Alongside the Appeal from the Rule 11 Sanctions in Order to Avoid the Clear and Irrevocable Legal Prejudice of Having the Appellate Court Make a Final Determination of Their Rights without Providing Them an Opportunity to be Heard?

Petitioner Barton respectfully submits that the opinion in this case, in which the Ninth Circuit held that it lacked jurisdiction to hear Mr. Barton's appeal from the combination reimbursement condition and sanction award imposed by the district court, overlooked the critical fact that the reimbursement award comprised a portion of the total sanctions award against Alioto. Thus, even though the appellate court purportedly held in its opinion that it had no power to hear the appeal from the Rule 41(a)(2) reimbursement portion of the order, it did in fact make a final determination on the appropriateness and the amount of the reimbursement condition by affirming the Rule 11 sanctions against Alioto. By reviewing the sanctions against Alioto, while dismissing the appeal of the reimbursement order which affected Mr. Barton, the appellate court created exactly the type of clear legal prejudice against Mr. Barton which mandated immediate appellate review from that order. The Ninth Circuit decided forever whether the reimbursement award was appropriate at all, and the amount of the reimbursement award, when it affirmed the award of sanctions against Alioto. It did this without

providing any opportunity for the plaintiffs or Mr. Barton to have their arguments on the merits of the district court's reimbursement order considered alongside Alioto's arguments regarding the sanctions award. The court, therefore, set forth the law of the case on the matter, which will directly affect Mr. Barton and the remaining plaintiffs.

The reimbursement condition of $165,774.94 *is part of* the sanctions award against Alioto of $294,141.10. The Alioto firm is required to pay the full amount, subject to any reimbursement from Mr. Barton and the plaintiffs for their portion of the reimbursements, subject to later apportionment by a Magistrate. This does not change the essential fact that the Court of Appeals' affirmance of the sanctions award also affirmed the reimbursement award.

Because it failed to consider the significance of the form of the order, the Ninth Circuit used the correct analysis to reach the wrong result. The real issue regarding appealability was not whether the Ninth Circuit had jurisdiction to affirm the reimbursement award, but rather whether the appellate court could *avoid* ruling on the reimbursement order while rendering an opinion on the Rule 11 sanctions against the Alioto firm. It could not. Thus, by applying the court's own analysis, it becomes plain that it erred in finding that it had no jurisdiction to hear Mr. Barton's appeal.

The standard for determining appealability of a Rule 41(a)(2) reimbursement award varies among the circuits. In *Coursen v. A.H. Robins Co.*, 764 F.2d 1329 (9th Cir. 1985), *corrected*, 773 F.2d 1049 (9th Cir. 1985), the Ninth Circuit adopted the view of the Fifth Circuit in *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976), that an appeal from a voluntary dismissal

is permissible if a condition is imposed which "imposes a condition that creates sufficient prejudice in a legal sense. [citing *LeCompte*] (appealability of an order depends on its effect rather than its language)." *Coursen*, 764 F.2d at 1342. In the present case, the court analyzed its previous opinion in *Coursen*. The court noted that *Coursen* had cited *LeCompte* rather than the later Fifth Circuit case of *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126 (5th Cir. 1978), *rehearing denied*, 582 F.2d 982 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979):

> "We find it especially significant that our statement in *Coursen* is supported by a citation to the Fifth Circuit's opinion in *LeCompte*, rather than to its more recent opinion in *Yoffe*. *LeCompte* differs from *Yoffe* in at least one important respect: Whereas *LeCompte* holds that a 'usual' Rule 41(a)(2) condition, such as 'payment of costs and attorneys' fees,' does not involve legal prejudice 528 F.2d at 603, *Yoffe* indicates that a condition imposing a 'clearly unreasonable' amount of costs and fees may amount to appealable legal prejudice. 580 F.2d at 131. Thus, consistent with *Coursen* and *LeCompte*, we hold that a condition of costs and attorney's fees does not involve legal prejudice and therefore does not render a conditional voluntary dismissal adverse and appealable." [App. A: A11.]

Petitioner agrees that a "usual" Rule 41(a)(2) condition of payment of costs and attorneys' fees does not involve legal prejudice. However, the reimbursement award in this case is anything but usual. Its effect, rather than its language, is final. *Coursen*, 764 F.2d at 1342. It is inextricably linked to a sanctions award against another

attorney, an award the Ninth Circuit held *was* appealable. If the Ninth Circuit's affirmance of that award stands, then there is nothing to prevent the defendants from obtaining the entire $294,141.10 from the Alioto firm. The Alioto firm can then seek apportionment of that award before the Magistrate. It will not be possible at that point for Mr. Barton to argue that the reimbursement order was improperly granted, or that the amount was excessive. The $165,774.84 figure of the award has been affirmed by the Ninth Circuit, *while applying the standard of review for the Rule 11 sanctions against the Alioto firm.*

It is no answer to Mr. Barton's dilemma for the Ninth Circuit to state that Mr. Barton can seek a writ of mandate from the court. If the court found that Mr. Barton suffers no legal prejudice from the denial of appellate jurisdiction and loss of any opportunity to be heard, what greater legal prejudice can Mr. Barton present in a petition for a writ of mandate? In any event, a writ of mandate is entirely discretionary, and if it is not granted, Mr. Barton will be back where he started. What is more, had Mr. Barton initially obtained a hearing on a petition for a writ of mandate, the Alioto firm could not have taken part because the sanctions award as to the firm was final, and, therefore, appealable, as held in the Court of Appeals decision itself. Mr. Barton submits that the only sensible and just solution to determine the validity of a hybrid order is to have the entire order, as it relates to all parties affected by it, heard in one appeal.

Petitioner does not dispute that district courts require flexibility and discretion in fashioning Rule 11 and Rule 41(a)(2) orders in appropriate cases.[3] However, that

[3]Mr. Barton does not, however, contend that the enormous Rule 11 sanctions imposed upon the Alioto firm are appropriate or within the district court's proper exercise of its discretion.

flexibility and discretion must end where it results in injustice. In this case, the district court imposed a massive reimbursement order on this petitioner and others which was intertwined with a massive award of sanctions against the Alioto firm. Not only did the Court of Appeals affirm the sanctions award to Mr. Barton's permanent detriment, but it silenced him by denying him from an opportunity to seek effective review of the district court's order.

The Ninth Circuit opinion opens the door for similar injustices by other courts unless this court acts now.

II.

Conclusion.

For all the above reasons, it is respectfully submitted that this court should grant this petition for a writ of certiorari in order to address the issue of whether combination reimbursement and sanction orders like the one in this case should be immediately appealable by all those affected by them. Thereafter, the judgment of the United States Court of Appeals for the Ninth Circuit, *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548 (9th Cir. 1986), on this issue should be reversed.

Respectfully submitted,

HAIGHT, DICKSON, BROWN & BONESTEEL,
ROY G. WEATHERUP, and
ROBERT L. KAUFMAN

Attorneys for Petitioner,
DONALD A. BARTON

APPENDIX

UNIOIL, INC., et al., Plaintiffs,

and

Heck Oil, Inc.; Heck & Heck, Inc.; and Mark Zelezny, Plaintiffs-Appellants,

v.

E.F. HUTTON & CO., INC.; Kurt Feshback; Stockbridge Partners, Inc.; Richard Jacoby; Haim Pekelis; Shearson-American Express, Inc.; and Goldman Sachs & Co.; and Donaldson, Lufkin & Jenrette Securities Corp., Defendants-Appellees.

No. 85-6024.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 3, 1986.

Decided Oct. 15, 1986.

As Amended on Denial of Rehearing
and Rehearing En Banc
Feb. 26, 1987

* * *

Appeal from the United States District Court,
Central District of California

Before WALLACE, FARRIS, and CANBY, Circuit Judges.

APPENDIX A

OPINION

WALLACE, Circuit Judge:

Heck & Heck, Inc. and Heck Oil, Inc. (the Heck companies) and Zelezny, along with their counsel, Joseph L. Alioto (Alioto) of the firm of Alioto & Alioto, and Donald Barton (Barton) of the firm of Donaldson & Barton, appeal from the district court's order granting their motion under rule 41(a)(2), Fed.R.Civ.P., for voluntary dismissal of their claims on condition that they reimburse the defendants $165,774.84 in expenses and attorneys' fees. Alioto appeals from the district court's order imposing sanctions against him for violations of rule 11, Fed.R.Civ.P., in the amount of $294,141.10. We dismiss the appeal from the rule 41(a)(2) order for lack of appellate jurisdiction. We have jurisdiction pursuant to 28 U.S.C. 1291 over Alioto's appeal from the rule 11 sanctions, and we affirm.

I

Unioil, Inc. (Unioil) is a company engaged in oil and gas exploration and production. During 1983, the price of Unioil's publicly traded stock soared from $1.25 per share early in the year to $13.75 per share in mid-December. At the beginning of February 1984, the stock was trading around $10 per share.

In early February 1984, Unioil's stock sharply declined. On February 7, the *Wall Street Journal* published an article reporting that several professional investors were selling Unioil stock "short" (i.e., were selling for future delivery stock that they did not yet own) in the belief that it was overvalued. The article stated that some of Unioil's public announcements had proven to be too optimistic. It also disclosed that Unioil's chairman of the board of directors, Richards, had twice

previously been cited by the Securities and Exchange Commission for making false and misleading statements. In the days following publication of this article, Unioil stock further plummeted to $2.625 per share.

On March 21, 1984, Unioil, Richards, the Heck companies and Zelezny, filed a complaint in district court. The Heck companies owned large blocks of Unioil shares. Zelezny, a stockbroker, also owned Unioil shares. In addition, the named plaintiffs purported to be representatives of a class of all other Unioil shareholders. Alioto and Barton acted jointly as counsel for all plaintiffs. They sued several brokerage houses and individuals (the defendants), alleging a concerted scheme to sell Unioil stock short in violation of federal antitrust and securities laws, RICO, and various California laws. The complaint further alleged that the defendants had defamed Unioil and Richards.

The role of Zelezny in this purported class action litigation merits special focus. Since the Heck companies were major shareholders of Unioil and appeared to be closely aligned with Unioil management including Richards, Zelezny was the only named plaintiff with the appearance of independence from Unioil leadership. Zelezny had his first contact with this litigation when Barton, the referring co-counsel, approached him in February 1984 about the alleged market manipulation of Unioil stock. Barton, not Zelezny, first raised the subject of Zelezny's becoming a named plaintiff in the case.

Zelezny had not yet agreed to become a named plaintiff when Unioil announced in late February 1984 that it and a group of its shareholders had retained Alioto to institute a class action alleging market manipulation of Unioil stock. Alioto never spoke with Zelezny prior to

filing the complaint, nor did he inquire whether Barton had investigated Zelezny's suitability as a named plaintiff in the purported class action. Alioto learned from Barton only that Zelezny had sold Unioil stock the day after the *Wall Street Journal* article appeared.

On May 3, 1984, the defendants commenced a deposition of Zelezny. The following day, Zelezny failed to appear for the continuation of his deposition. Instead, Barton announced that Zelezny had decided to withdraw as a named plaintiff and would not appear for further deposition questioning. The defendants then obtained a magistrate's order requiring Zelezny to complete his deposition. Zelezny appeared for three more days of testimony. Zelezny's deposition testimony was, in the judgment of the district court, "in many critical respects contrary to the allegations of the complaint": (1) whereas the complaint alleged that defendants' short selling and fraudulent misrepresentations drove the price of Unioil stock down and caused shareholders to sell at a loss, Zelezny testified that, aware that short selling was occurring, he purchased rather than sold Unioil shares in the belief that the price of the shares would eventually be driven up when the short sellers had to cover; (2) whereas the complaint alleged that plaintiffs sold Unioil shares at artificially depressed prices between December 1, 1983 and February 29, 1984, Zelezny testified that he thought that Unioil was selling at a fair price until February 7, 1984; and (3) whereas the complaint alleged that plaintiffs engaged in stock transactions based on false statements by defendants, Zelezny testified that he never bought or sold Unioil stock in reliance on anything said by any of the defendants.

On May 14, one day before Zelezny's deposition was to resume again, Barton announced that Zelezny would not appear, that neither plaintiffs nor their attorneys would appear for any further depositions, and that plaintiffs would voluntarily dismiss their complaint. On May 15, 1984, plaintiffs filed a notice purporting to dismiss their entire action without prejudice pursuant to Fed.R.Civ.P. 41(a)(1). One defendant objected to the notice on the ground that dismissal of an alleged class action requires court approval under rules 23(e) and 41(a)(1), Fed.R.Civ.P. Plaintiffs then moved pursuant to rule 41(a)(2), Fed.R.Civ.P., for a court order approving the dismissal of their action without prejudice. In support of their motion, plaintiffs cited three Unioil shareholder class actions that had been filed against Unioil and Richards in mid-April 1984. These actions named Unioil and Richards as defendants and alleged that mismanagement was the cause of the decline in the price of Unioil stock. Perceiving that Alioto and Barton would face a conflict of interest in representing both Unioil and the class of Unioil shareholders, plaintiffs stated their desire not to assert claims on behalf of the shareholder class.

In response to plaintiffs' rule 41(a)(2) motion, defendants asked the district court to require, as a condition of any dismissal without prejudice, that plaintiffs and their counsel pay defendants' attorneys' fees and costs incurred in the action. Pursuant to Fed.R.Civ.P. 11, defendants further sought sanctions of attorneys' fees and costs against plaintiffs' counsel on the grounds that plaintiffs' counsel undertook representation of plaintiffs with conflicting interests and failed to conduct a reasonable inquiry into the factual basis of the complaint. At this juncture, Unioil and Richards, through newly retained counsel, withdrew their motion for court approval of dismissal of their claims.

In November 1984, the district court entered an order granting the motion of the Heck companies and Zelezny for dismissal without prejudice of their individual and class claims *on condition that* these plaintiffs and/or their counsel — Alioto and Barton — "reimburse defendants for their costs and expenses, including attorneys' fees, reasonably incurred in defending against the class action claims." The district court imposed another condition that is not at issue on this appeal.

The district court also imposed rule 11 sanctions of attorneys' fees and costs against Alioto. The court held that Alioto's conduct had violated rule 11 in three respects: (1) Alioto did not conduct a reasonable investigation into the facts upon which the class allegations were made or into the potential conflict of interest that was inherent in undertaking representation of the class of Unioil shareholders in an action in which Unioil was one of the named plaintiffs; (2) Alioto tried to disengage from class discovery without cause and from the class action suit without court approval; (3) Alioto submitted declarations, in opposition to defendants' motions, that plainly did not comport with the requirements for statements under oath.

Alioto then moved the court to reconsider its order on the ground that the court had failed to consider material facts that had been brought to its attention. In an order dated January 14, 1985, the district judge found that Alioto's arguments were without basis and were made in bad faith. She therefore ordered that Alioto be further sanctioned under rule 11 in the amount of attorneys' fees and costs reasonably incurred by defendants in opposing the motion to reconsider.

The district court referred the determination of the amount of attorneys' fees and costs on the rule 41(a)(2)

condition and under the rule 11 sanctions to a magistrate. In an order entered in June 1985, the district court confirmed the magistrate's recommendation that plaintiffs' voluntary dismissal without prejudice of their class action claims be conditioned on the payment by the Heck companies, Zelezny, Alioto, or Barton of $165,774.84 to defendants. The court further confirmed that the rule 11 sanctions required Alioto to pay to defendants within thirty days $294,141.10, such amount to be reduced by any reimbursement received by defendants during that period under the rule 41(a)(2) condition.

In an order entered in March 1986, the district court dismissed Unioil's and Richards' individual claims with prejudice for failure to prosecute. Unioil and Richards are not parties to this appeal.

II

The Heck companies, Zelezny, Alioto, and Barton purport to appeal from the district court's rule 41(a)(2) order conditioning the dismissal without prejudice of their claims on the reimbursement to defendants of costs and attorneys' fees in the amount of $165,774.84. While no party raises the issue, we must address sua sponte whether we have jurisdiction over this appeal. *See Baumann v. Arizona Department of Corrections* 754 F.2d 841, 843 (9th Cir. 1985).

We may readily reject one seeming jurisdictional defect — the fact that the order appealed from is interlocutory in that it was entered at a time when the claims of Unioil and Richards remained to be decided by the district court. Absent a certificate under Fed.R.Civ.P. 54(b), such an order is generally not appealable. In *Anderson v. Allstate Insurance Co.*, 630 F.2d 677 (9th Cir. 1980) (*Allstate*), however, we described an exception to the

finality rule: we held that we may treat an interlocutory order as a final order when that portion of the case that remained in the district court has subsequently been terminated. *Id.* at 680-81. Because Unioil's and Richards' claims have since been dismissed with prejudice, we may, under *Allstate*, disregard the fact that they previously rendered the district court's order interlocutory.

This, however, is not the end of our jurisdictional inquiry, for a far more troubling difficulty besets this appeal. Rule 41(a)(2), governing voluntary dismissal by court order, provides in part: "Except as provided in [rule 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Fed.R.Civ.P. 41(a)(2). As we explained recently in *Lau v. Glendora Unified School District*, 792 F.2d 929 (9th Cir. 1986) (per curiam) (*Lau*), an order granting a conditional voluntary dismissal does not take effect of its own force. *Id.* at 930. Rather, the plaintiff has "a reasonable period of time within which [either] to refuse the conditional voluntary dismissal by withdrawing [the] motion for dismissal or to accept the dismissal despite the imposition of conditions." *Id.* at 931.

Here, the Heck companies and Zelezny have neither withdrawn their motions for voluntary dismissal under rule 41(a)(2) nor expressly accepted the conditional voluntary dismissal. Three courses of action present themselves. First, we could conclude that the failure expressly to accept the conditional voluntary dismissal renders it inoperative. If so, their claims survive in the district court, the order from which they and counsel appeal is interlocutory, and we are without jurisdiction. Second, we could determine that by not withdrawing their motions for voluntary dismissal within a reasonable

time, the Heck companies and Zelezny must be deemed to have accepted the conditional voluntary dismissal. Under this approach, the district court's order would be final. Third, as we did in *Lau*, 792 F.2d at 930, we could remand this case to the district court in order that they could clearly choose either to withdraw their motions for voluntary dismissal or to accept the conditional voluntary dismissal.

We cannot pursue the first course of action. *Lau* makes clear that a plaintiff must affirmatively act to withdraw a motion for voluntary dismissal. To construe inaction as rejection of a conditional voluntary dismissal would conflict with *Lau*.

We are left to choose between our second and third courses of action. Significantly, *Lau* in no way indicates that we should always remand when a plaintiff has neither withdrawn the motion for voluntary dismissal nor accepted the conditional voluntary dismissal. On the contrary, *Lau* expressly left open "whether a plaintiff who fails to withdraw the motion for dismissal [may] be regarded as having consented to the conditions attached." 792 F.2d at 931. We merely deemed remand "appropriate under [the] circumstances," as we observed both that the district court had not expressly granted plaintiff the option of withdrawing her motion for voluntary dismissal and that we had not previously held that plaintiffs should be made aware of such an option. *Id.* We therefore read *Lau* to hold that remand may be appropriate where a plaintiff neither knew nor had reason to know of the option of withdrawing the motion for voluntary dismissal.

Unlike the plaintiff in *Lau*, the Heck companies and Zelezny were plainly aware of their option to withdraw the motion for voluntary dismissal. In their reply

memorandum opposing defendants' request for rule 41(a)(2) conditions, they explicitly spelled out this option, citing as authority the very District of Columbia Circuit case that *Lau* follows. Under these circumstances, a remand to the district court would be pointless.

Deciding a question left open by *Lau*, we therefore hold that a plaintiff who knows or has reason to know that he may withdraw his motion for dismissal will be deemed to have consented to the conditions attached to the voluntary dismissal unless he withdraws his motion within a reasonable time. The Heck companies and Zelezny have not withdrawn their motions within a reasonable time, but have instead pursued an appeal. It follows that they must be deemed to have accepted the district court's conditional voluntary dismissal. Therefore, the rule 41(a)(2) order from which they and counsel appeal is a final order.

That the order granting the conditional voluntary dismissal is final, however, does not alone mean that we have jurisdiction. To be appealable, an order must be adverse to the appealing party. As a general rule, a plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him. *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986); *Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (per curiam).

The circuits have provided a range of answers to the question whether this general rule applies to a conditional voluntary dismissal. The Sixth Circuit has held that conditional voluntary dismissals are not appealable, since the plaintiff has agreed to the order, even if with reluctance. *Scholl v. Felmont Oil Corp.*, 327 F.2d 697, 700 (6th Cir. 1964); *see also* 9 C. Wright & A. Miller, *Federal Practice & Procedure* 2376, at 247.

In *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) (LeCompte), the Fifth Circuit adopted an intermediate position, holding that a plaintiff can appeal a rule 41(a)(2) conditional dismissal that "involves prejudice in a legal sense." *Id.* at 604. In *LeCompte*, the trial court, while denominating its order a dismissal without prejudice, *id.* at 603, had imposed rule 41(a)(2) conditions that "severely circumscribed [plaintiff's] freedom to bring a later suit." *Id.* at 604; *see id.* at 602 (conditions included requirement that any subsequent suit be brought in same court and only upon showing of extraordinary circumstances). The Fifth Circuit distinguished

> the usual conditions attached to a voluntary dismissal, [which] involve prejudice only in a practical sense (*e.g.*, paying costs or expenses, producing documents, producing witnesses). The imposition of this type condition does not amount to the type of "legal prejudice" which would entitle a plaintiff to appeal the grant of the dismissal he obtains.

Id. at 603; *see also Yoffe v. Keller Industries. Inc.*, 580 F.2d 126, 129-31 (5th Cir. 1978) (*Yoffe*), *cert. denied*, 440 U.S. 915 (1979).

The Seventh Circuit is most expansive in its view of appellate jurisdiction over voluntary conditional dismissals. In *Cauley v. Wilson* 754 F.2d 769, 770-71 (7th Cir. 1985), the Seventh Circuit held that it had jurisdiction of voluntary dismissals conditioned on payment of fees, "at least in cases in which a plaintiff requests a dismissal in order to proceed in state court." *Id.* at 771; *see also id.* at 770-71 (suggesting, arguably erroneously, that the District of Columbia Circuit has held that it has jurisdiction over appeals of voluntary dismissals conditioned on payment of fees).

We spoke on the issue in *Coursen v. A.H. Robins Co.*, 764 F.2d 1329 (9th Cir.) (*Coursen), corrected*, 773 F.2d 1049 (9th Cir. 1985), where we held that a dismissal with prejudice was appealable, whether voluntary or involuntary. 764 F.2d at 1342-43, *corrected*, 773 F.2d at 1049. In the course of so holding, we stated, "A plaintiff may appeal a voluntary dismissal which imposes a condition that creates sufficient prejudice in a legal sense." 764 F.2d at 1342. We cited *LeCompte* as authority for this proposition, and also cited, with a *see also* signal, a case involving involuntary dismissal, *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1186-87 (8th Cir. 1984). *Coursen*, 764 F.2d at 1342-43.

Accepting the statement in *Coursen* that a plaintiff may appeal a conditional voluntary dismissal that imposes sufficient legal prejudice, we must determine whether the condition of costs and attorneys' fees imposed on the rule 41(a)(2) order in this case renders the order appealable. We find it especially significant that our statement in *Coursen* is supported by a citation to the Fifth Circuit's opinion in *LeCompte*, rather than to its more recent opinion in *Yoffe*. *LeCompte* differs from *Yoffe* in at least one important respect: whereas *LeCompte* holds that a "usual" rule 41(a)(2) condition, such as "payment of costs and attorney's fees," does not involve legal prejudice, 528 F.2d at 603, *Yoffe* indicates that a condition imposing a "clearly unreasonable" amount of costs and fees may amount to appealable legal prejudice. 580 F.2d at 131. Thus, consistent with *Coursen* and *LeCompte*, we hold that a condition of costs and attorney's fees does not involve legal prejudice and therefore does not render a conditional voluntary dismissal adverse and appealable. In so holding, we in no way intend to suggest that we find the amount of costs and fees in this case clearly

unreasonable. Nor do we foreclose the possibility that review of clearly unreasonable conditions could be obtained through a writ of mandamus.

Because the condition of costs and attorneys' fees that plaintiffs and counsel challenge does not involve legal prejudice, it is not adverse, and we have no jurisdiction over this appeal. We therefore dismiss the appeal of the rule 41(a)(2) order.

III

Alioto challenges on several grounds the district court's imposition of rule 11 sanctions against him. The jurisdictional defect that precludes our review of the district court's rule 41(a)(2) order does not apply to Alioto's rule 11 appeal, since the court's imposition of sanctions is plainly adverse to him. An order imposing sanctions solely upon counsel, a non-party to the underlying action, is immediately appealable as a final order. *Optyl Eyewear Fashion International Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985); *Kordich v. Marine Clerks Association*, 715 F.2d 1392, 1393 (9th Cir. 1983).

Rule 11, as amended in 1983, states in part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not

> interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed.R.Civ.P. 11. A violation of rule 11 need not be premised on a finding of subjective bad faith. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986) (*Zaldivar*). Rather, an attorney violates rule 11 whenever he signs a pleading, motion, or other paper without having conducted a *reasonable inquiry* into whether his paper is frivolous, legally unreasonable, or without factual foundation. *Id.* at 830-31. An attorney also violates rule 11 whenever he signs a paper that is filed for a purpose that is improper under an objective standard. *Id.* at 831 & n.9.

In *Zaldivar*, we set forth the following standards of review for orders imposing rule 11 sanctions:

> If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropri-

> ateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

Id. at 828 (footnote omitted).

A.

The primary ground — indeed, according to Alioto's reply brief, the sole ground — upon which the district judge imposed rule 11 sanctions in her November 1984 order was that Alioto had failed to conduct a reasonable inquiry into the facts upon which the class allegations in the complaint were based and into the potential conflict of interest inherent in representing a class of Unioil shareholders while at the same time representing Unioil and Richards.

Whether Alioto's inquiry was reasonable must be determined in light of the circumstances in which he acted. *See* Fed.R.Civ.P. 11 advisory committee note ("The standard is one of reasonableness under the circumstances.") From factual findings of the district court that Alioto has not shown to be clearly erroneous, we conclude that the relevant circumstances include (1) that Alioto had reason to know that Zelezny was the only named plaintiff with the appearance of independence from Unioil and its management; (2) that Alioto had never previously worked with Barton and knew virtually nothing about him, his experience, or his inquiry into Zelezny's suitability as a class plaintiff; and (3) that the Alioto firm is, and represented itself as, experienced and specialized in complex business litigation. There was a substantial retainer paid to Alioto and there was ample time for investigation and, therefore, there were no severe constraints of time or money that impeded Alioto's inquiry. Finally, we consider it significant that the class allegations filed by

Alioto threatened defendants with massive liability and foreseeably aroused a vigorous and costly defense. Just as the gravity of foreseeable injury is relevant to determining a party's standard of care in a negligence case, so should the cost of a foreseeable response by opposing parties be relevant to determining an attorney's standard of reasonable inquiry.

We now consider whether Alioto conducted a reasonable inquiry into the facts upon which the class allegations were based. Alioto does not dispute the district court's findings that he never spoke with Zelezny prior to filing the complaint and that he never asked of, or learned from, Barton information bearing on whether Zelezny was a sophisticated investor, whether Zelezny had relied upon any of the defendants' representations, and whether Zelezny would fairly and adequately represent the class. According to a finding of fact that we do not find clearly erroneous, Alioto knew only that Zelezny had sold Unioil stock the day after the *Wall Street Journal* article was published. We agree with the district court that, aware of this fact alone, Alioto had no reasonable basis for determining that Zelezny's "claims or defenses [were] typical of the claims or defenses of the class," Fed.R.Civ.P. 23(a)(3), or that Zelezny would "fairly and adequately protect the interests of the class," Fed.R.Civ.P. 23(a)(4).

Alioto offers three basic arguments to support his contention that he did not violate rule 11. First, he argues that his reliance on Barton satisfied the requirement of reasonable inquiry. We agree that reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry. *See* Fed.R.Civ.P. 11 advisory committee note. In relying on another lawyer, however, counsel must "acquire[ ] knowledge of facts sufficient to enable him to certify that the paper

is well-grounded in fact." Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 187 (1985). An attorney who signs the pleading cannot simply delegate to forwarding co-counsel his duty of reasonable inquiry. *Id.*

Second, Alioto appears to argue that he did not violate rule 11 since Zelezny was in fact a proper class plaintiff. The core of Alioto's argument is that Zelezny's lack of reliance on defendants' alleged misrepresentations is irrelevant to his viability as a class representative since, under *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), proof of subjective reliance is unnecessary to establish a rule 10b-5 claim. *But see, e.g., Lewis v. Johnson* 92 F.R.D. 758, 759-60 & n.1 (E.D.N.Y. 1981) (even though class action plaintiffs need not prove reliance in a securities fraud case, certification must be denied when the putative class plaintiff is subject to atypical reliance and materiality defenses that might prejudice the class' chances of success). Alioto did not make this argument as a defense to the imposition of rule 11 sanctions in the district court and has provided us with no reasons for his failure to do so. Therefore, because we believe that no manifest injustice will result if we decline to consider the issue, we will not address it here. *See Alexopulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986).

Third, Alioto argues that the Heck companies were proper class plaintiffs and that we must give substantial weight to his investigation into their claims in deciding whether his inquiry into the facts underlying the class allegations was reasonable. We disagree. Alioto had reason to know that the Heck companies appeared to be closely aligned with Unioil and its management. The district court did not err in determining that a reasonably competent business attorney should have realized, upon

reading the *Wall Street Journal* article, the strong possibility that Unioil shareholders would sue Unioil management. Under these circumstances, Alioto had a duty to take reasonable steps to ensure that the class claims were represented by a plaintiff independent of Unioil management and otherwise qualified under rule 23(a). Alioto took no such steps.

We therefore hold that the district court did not err in concluding that Alioto violated rule 11 by not making a reasonable inquiry into the facts on which the class allegations of the complaint were based. For similar reasons, we affirm the district court's conclusion that Alioto failed to conduct a reasonable inquiry into the potential conflict of interest inherent in representing a class of Unioil shareholders together with Unioil and Richards. As we just stated, the district court properly found that a reasonably competent business attorney should have recognized from the beginning the clear likelihood that Unioil shareholders would bring suit against Unioil management. We focus only on the duty Alioto had to conduct a reasonable inquiry into whether he should bring the class claims in the face of the potential conflict of interest. The record indicates that Alioto made no reasonable inquiry into the potential conflict of interest prior to filing the complaint. The district court properly determined that Alioto thereby violated rule 11. Because Unioil management was not found liable for a rule 11 violation, we need not assess defendants' allegation that the class claims filed by Alioto were part of a ploy by Unioil management to divert shareholders from suing Unioil and its management.

The district court provided at least two additional grounds for its imposition of sanctions in its November 1984 order. Because we conclude that the primary grounds by themselves are sufficient to sustain the

sanctions imposed in the November 1984 order, we have no reason to address these additional grounds.

B.

In its January 1985 order imposing rule 11 sanctions on Alioto for filing a motion to reconsider, the district judge found that Alioto had made "a total lack of any showing that the court [had] failed to consider a material fact presented to it." She further found that Alioto had unnecessarily and unreasonably multiplied the litigation. On appeal, Alioto argues only that he had a good ground to bring the motion, since the district court in its November 1984 order had, he argues, failed to consider evidence that he had relied on Barton. The district judge, however, had not failed to consider such evidence; on the contrary, she had held that the evidence was not sufficient to show that Alioto had relied on Barton. We affirm the court's ruling that Alioto's motion to reconsider violated rule 11.

C.

Once a court finds that an attorney has violated rule 11, it *must* impose sanctions. *Zaldivar*, 780 F.2d at 831; *accord Albright v. Upjohn Co.* 788 F.2d 1217, 1221-22 (6th Cir. 1986); *Westmoreland v. CBS. Inc.* 770 F.2d 1168, 1174-75 (D.C. Cir. 1985) (*Westmoreland*). Rule 11 authorizes a court to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Fed.R.Civ.P. 11. "The selection of the type of sanction to be imposed lies of course within the district court's sound exercise of discretion." *Westmoreland*, 770 F.2d at 1175.

In its November 1984 and January 1985 orders, the district court ordered sanctions against Alioto in the amount of reasonable expenses, including attorneys' fees, incurred because of the papers filed in violation of rule 11. This type of sanction plainly comports with rule 11, and we find no abuse of discretion.

Alioto further challenges the amount of the rule 11 sanctions — $294,141.10, to be offset by any reimbursement received by defendants within thirty days pursuant to the rule 41(a)(2) conditional voluntary dismissal. Assisted by a magistrate, the district court determined this amount after careful proceedings in which Alioto fully participated. Alioto's arguments on appeal amount to nothing more than a blanket charge that the amount of the sanctions is patently unreasonable. We agree that the expenses and attorneys' fees determined to have been incurred by the defendants were substantial. But we cannot find them patently unreasonable in light of the massive liability that the complaint filed by Alioto threatened to impose upon multiple defendants.

AFFIRMED IN PART; DISMISSED IN PART.

ENTERED
NOV 28 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

NOV 29 1984
FILED
NOV 21 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNIOIL, INC., et al.,	)	NO. CV 84-1833-PAR(Bx)
Plaintiffs,	)	
vs.	)	MEMORANDUM OF DECISION
E.F. HUTTON & CO., INC., et al.,	)	
Defendants.	)	

This is a purported class action on behalf of Unioil shareholders in which the named plaintiffs are Unioil, its President Melvin Lloyd Richards, Heck Oil, Inc., Heck & Heck, Inc., and Mark Zelezny, against various broker-dealers alleging market manipulation of Unioil stock. Until recently all plaintiffs were represented by Donald Barton ("Barton") and Joseph L. Alioto of

Alioto & Alioto ("Alioto"). Plaintiffs Heck Oil, Inc., Heck & Heck and Zelezny have moved for approval of their dismissing class action claims; and various defendants have moved for sanctions against all plaintiffs and their counsel (except for newly substituted counsel for Unioil and Richards). Based upon the papers, oral argument and supplemental briefing requested at the hearing on the motions, the Court concludes that the motion for approval of dismissal should be granted on certain conditions and that sanctions should be awarded for counsel's violation of F.R.Civ.P. Rule 11.

FINDINGS OF FACT

1. Plaintiff Unioil, Inc. is a company engaged in oil and gas exploration and production. During 1983, its stock apparently rose in value rapidly from about $1.25 per share in the early part of the year to about $13.75 per share in mid-December. In late December, the stock price fell off somewhat to about $10 per share and held at that level until early February, 1984.

2. On February 7, 1984, *The Wall Street Journal* published an article about Unioil, raising some doubts about the accuracy of the company's public announcements and disclosing that one of its top executive officers, plaintiff Melvin Lloyd Richards, had previously been cited by the Securities and Exchange Commission for making false or misleading statements on two prior occasions.

3. In the days just before and after the publication of this article, Unioil's stock plummeted from around $10 per share to $2.625 per share. The stock is now trading at about $3 share.

4. On February 16, 1984, defendant Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ") filed

suit against Richards and others to collect on a promissory note Richards allegedly had given DLJ. Richards allegedly gave DLJ the note in an attempt to settle a number of trading accounts maintained by persons allegedly associated with Richards which were in default as a result of unpaid purchases of Unioil stock. DLJ later amended its complaint in that action to name as defendants Heck Oil, Inc. and Heck & Heck, Inc., two companies that had maintained the alleged delinquent accounts. Both Heck Oil and Heck & Heck are also plaintiffs in this action.

5. On February 22, 1984, Unioil issued a press release announcing that it and a group of its shareholders had retained Joseph L. Alioto of the Alioto & Alioto law firm to institute a class action lawsuit alleging market manipulation of Unioil stock by a group of national brokerage firms and certain individuals. The press release listed Unioil and the Alioto law firm as contacts for the news story.

6. Mark Zelezny, one of the named plaintiffs herein, had not yet agreed to act as a plaintiff at the time that Unioil issued the press release. Zelezny deposition at 681, line 27 to 682, line 13. Zelezny, a stock broker and shareholder in Unioil, was first approached by Donald Barton, one of plaintiffs' counsel, about the alleged market manipulation of Unioil stock some time after January of 1984. Zelezny Declaration at ¶ 2. It was Barton, and not Zelezny, who first raised the subject of Zelezny's becoming a plaintiff in the case. Zelezny Deposition at 650, lines 7-9. Zelezny did not actually agree to become a named plaintiff until three or four weeks after his first discussion with Barton. *Id.* at 642, lines 3-20; 670, lines 7-10; 681, line 27 to 682, line 13. This was some time between March 1 and one week prior to the filing of the complaint on March 21, 1984.

7. Zelezny had no role in selection of the lawyers who filed the complaint. Zelezny Deposition at 671, line 27 to 672, line 13. Instead, he was simply told that they would be his attorneys. *Id.* Neither anyone from the Alioto firm nor any other counsel took any direction from Zelezny in preparation of the lawsuit. *Id.* at 711, lines 4-11. Although Zelezny was told the contents of the complaint prior to its being filed, Zelezny Declaration at ¶ 4, he never spoke to Joseph L. Alioto, the lawyer whose signature appears on the complaint. *Id.* at 677, lines 12-26.

8. The complaint was filed March 21, 1984.

9. On March 29, 1984, Unioil mailed a letter to all Unioil shareholders informing them of plaintiffs' suit and soliciting contributions to a class action fund, to be sent to Barton.

10. After being served with the complaint, the defendants immediately filed motions to dismiss based, among other things, on plaintiffs' failure to comply with the class action pleading requirements of Local Rule 18.2; and immediately initiated the expedited discovery as to class certification issues that is required by Local Rule 18. Defendant DLJ served an extensive request for production of documents and noticed depositions of the five named plaintiffs and of the plaintiffs' counsel. The first of these depositions, the Zelezny deposition, was convened on May 3. Each of the other named defendants retained counsel and participated in these early proceedings.

11. On May 4, the scheduled second day of the Zelezny deposition, plaintiffs' counsel Donald Barton announced that Zelezny had decided to withdraw as a plaintiff and would not appear for further deposition. Zelezny Deposition at 246, line 4 to 248, line 21, and 253, lines

12-16. Defendants obtained an order from Magistrate Brown compelling Zelezny to appear and complete his deposition and awarding sanctions against plaintiffs. The deposition then continued on May 10, 11 and 12.

12. With the Zelezny deposition scheduled to resume on May 15, Barton informed defendants on May 14 that plaintiffs intended to dismiss their suit under Rule 41(a)(1) and that none of the plaintiffs or their attorneys would appear for further depositions. See Howard Declaration at ¶ 17.

13. Plaintiffs filed a notice of dismissal under Rule 41(a)(1) purporting to dismiss the entire lawsuit on May 15, 1984, and maintaining that no court approval was necessary. On the same day DLJ filed an objection on the ground that Rule 23(e) precludes dismissal of a purported class action without court approval. On May 24, plaintiffs filed a motion seeking court approval of their dismissal without prejudice pursuant to Rule 41(a)(2). Defendants filed substantial papers in opposition.

14. Thereafter, through newly retained counsel, plaintiffs Unioil, Inc. and Melvin Lloyd Richards filed a withdrawal of the motion seeking court approval of dismissal.

15. Zelezny's understanding of the facts underlying the complaint is in many critical respects contrary to the allegations of the complaint. While the complaint alleges that defendants' conduct of "short selling" Unioil stock drove the price of the stock down and caused plaintiffs to sell the stock at a loss, complaint at ¶¶ 19-26, 28 and 31, Zelezny stated that his awareness of the short selling of Unioil stock caused him to purchase the stock, rather than sell it, based on his belief that the short sellers would eventually drive the price of the

stock up. Zelezny Deposition at 232, line 17 to 239, line 2; 412, line 10 to 413, line 22; 418, line 7 to 419, line 11.

16. While the complaint alleges that the plaintiffs sold Unioil stock at depressed prices between December 1, 1983 and February 29, 1984, Zelezny testified that he thought that Unioil was trading at a fair price during the period up until February 7, 1984. Zelezny Deposition at 627, line 24 to 628, line 23; and 675, line 27 to 677, line 2.

17. While the complaint alleges that plaintiffs engaged in stock transactions based on the false negative statements by defendants, Zelezny testified that he never bought or sold any Unioil stock based on anything said by any of the defendants. Zelezny Deposition at 731, line 27 to 732, line 6.

18. Alioto is an experienced and prominent law firm known to concentrate on complex business litigation such as antitrust, securities and class actions. The firm so held itself out in connection with their representation of plaintiffs in this case; and requested and received a $100,000 retainer.

19. Defendants have incurred substantial legal expenses on account of the class action allegations and as a result of counsels' having certified that they were brought in compliance with F.R.Civ.P. Rule 11. These would not have been necessary had the class action plaintiffs been named and the complaint filed, and had class action discovery and dismissal proceedings been conducted, in conformity with the Local Rules of the Central District and as contemplated by Rule 11. Plaintiffs' counsel concedes that if plaintiffs dismiss this action, defendants will not need class action discovery. Memorandum in support of motion for order of

dismissal without prejudice, page 6. Thus, except for work done on the substantive aspects of their motions to dismiss plaintiffs' complaint, the legal work engaged in by defendants has been needlessly undertaken.

20. Although Alioto argues that the class allegations pertain only to Zelezny, Heck & Heck and Heck Oil, not to Richards and Unioil, it is impossible to discern this from the pleading actually filed. *See e g.*, complaint, ¶¶ 6, 7, 8, 9, 10.

21. Heck & Heck, and Heck Oil are major shareholders of Unioil and appear to be closely aligned with Unioil and Richards. It was at their suggestion that Richards consulted with Alioto and it was they who posted the retainer with Alioto.

22. Documents purporting to be "Declarations" submitted by Alioto in connection with these motions are neither affidavits nor under penalty of perjury. See 28 U.S.C. § 1746; F.R. Civ.P. 56(e); Local Rule 7.5.3. Having signed the papers in opposition was therefore also in violation of Rule 11.

CONCLUSIONS OF LAW

Conditions on Dismissal of Class Action.

(1) A plaintiff's voluntary dismissal may be subject to such conditions, including costs and attorneys' fees, as the court deems appropriate to protect the defendant from prejudice or inconvenience. *Davis v. McLaughlin,* 326 F.2d 881 (9th Cir. 1964), *cert. denied,* 379 U.S. 833 (1964); *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364 (D.C. Cir. 1981). Costs and fees incurred by defendants in moving to dismiss the complaint (at least to the extent of its class action allegations), in conducting discovery directed to class certification issues, and in

responding to plaintiffs' original attempt to dismiss voluntarily without court approval were incurred solely because of the class allegations and plaintiffs' failure to dismiss their representative claims once it appeared appropriate to do so. [J. M. Alioto Declaration, ¶ 2 (no later than mid-April, when the *Wolfe, Wilson* and *Deutsch* suits were filed).] However, costs and fees attributable to defendants' efforts to oppose the motion for court approval should not be reimbursed as a condition to dismissal without prejudice.

(2) Although no class action has been certified, Local Rule 18.5 specifies that the requirements of F.R.Civ.P. Rule 23(e) apply to "purported class actions" as well. Even those cases relied upon by plaintiffs recognize that notice of with drawal is appropriately given when the putative class members could have been induced to rely on the filing of the suit by the named plaintiffs. *See Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975); *Robinson v. First National City Bank*, 482 F.Supp. 92 (S.D.N.Y. 1979).

Here class members received an announcement of the suit, informing them that defendants were pursuing an action in their behalf and soliciting their contributions; and a press release was issued about the impending class action. Absent class members may therefore not be acting on their claims in reliance upon this lawsuit. As there is also an indication that the class action allegations were made by the named plaintiffs without a substantial foundation in fact, it would not be unfair to impose the economic burden of re-noticing the class. At the same time, there are now pending three shareholder class action suits which may mean (a) that class members' claims against the broker defendants, if any, are tolled as well so that there is no statute of limitations problem

and (2) that the most efficient and least confusing vehicle for notifying the class of the voluntary dismissal of the class action against the broker defendants is when the class determination is made in *Wolfe, Wilson* and *Deutsch.*

Sanctions.

Plaintiffs' arguments as to why sanctions for violations of Rule 11 should not be awarded are not persuasive. *First*, there is nothing in Rule 11 which precludes imposition of sanctions prior to conclusion of the litigation. While I recognize that to make the findings required for a Rule 11 violation (that the motion or pleading is not well-grounded in fact and warranted by existing law, for an improper purpose) may in some instances have overtones of a premature determination of malicious prosecution, nevertheless the Rule expressly contemplates an award of sanctions in connection with a "motion or other paper" in violation of Rule 11, as well as a pleading, and provides for a determination of sanctions upon motion by a party or the court on its own initiative, at a time within the judge's discretion. Advisory Committee Note, 97 F.R.D. 200-01. Moreover, in this case even that possibility is obviated because the conduct violative of Rule 11 does not go to the merits. The only conduct found contrary to Rule 11 and subject to sanctions is the failure by counsel who signed the pleadings so much as to consult with one of his clients before bringing a class action in part in his name, when that consultation would or should have readily disclosed that that person's experience was contrary to that about which the class was to complain and that a potential conflict of interest was inherent in undertaking representation of a class action in which one of the named plaintiffs was Unioil; thereafter to try to disengage both from class discovery without cause and from the class action suit without seeking court approval; and to oppose

defendants' motions based on declarations which plainly do not comport with the requirements for statements under oath in federal court.

Second, no showing of bad faith is required. As put by the Advisory Committee notes: "The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances . . . . This standard is more stringent that the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." *Id.* at 198-99.

Third, there is no substantial evidence to show that plaintiffs' counsel made any reasonable inquiry to determine whether the shareholder class action claims were well-grounded in fact, warranted under existing law, and not interposed for an improper purpose. There was ample time for investigation, but Alioto never discussed the claim he asserted for Zelezny in behalf of the class with him. The importance of doing so is manifest because he was the only named shareholder with the appearance of independence from Unioil. There is no showing that Alioto relied on Barton's having done so, or that Barton did anything more than simply solicit Zelezny as a plaintiff and determine in a cursory way that he had made transactions in Unioil stock. It is implausible that counsel as experienced as Alioto would not have perceived the conflict of interest inherent in representing Unioil and Richards and their purporting to represent Unioil shareholders; or the inappropriateness of Zelezny's serving as a representative plaintiff when his view of facts *contradicted* those upon which the complaint proceeds. *Cf. Surowitz v. Hilton Hotels*, 383 U.S. 363 (plaintiff didn't *understand* complaint).

Nor, apart from Zelezny's testimony, is there any substantial evidence that plaintiffs' counsel reasonably investigated the facts upon which the class action allegations were made. The declarations of Richards, Joseph L. Alioto, Joseph M. Alioto and Heckenkamp do not comply with *any* of the applicable rules for presentation of admissible evidence. C.C.P. § 2015.5; Local Rule 7.5.3; F.R.Civ.P. Rule 56(e). Even were they fully credited, nothing in these statements supports a finding that a reasonable investigation was made with respect to class action aspects of the complaint.

Moreover, it appears that Alioto's causing the class action complaint as to plaintiffs Richards and Unioil to be filed, followed by requesting dismissal was also in violation of Rule 11. Although §§ 9 and 10 of the complaint tend to suggest that only Zelezny and the Heck plaintiffs bring the action as a class action, both the motion for dismissal without prejudice and memorandum in support speak for all plaintiffs [Memo, page 2, lines 4-8] and admit that "the plaintiffs asserted the claims in their complaint both as individual claims, and as class action claims, brought on behalf of a class consisting of Unioil shareholders." Memo, page 2, lines 15-17. Further, their motion (and proposed order) filed May 24, 1984 sought dismissal of "the action" without prejudice, motion, page 2; their reply memorandum re: requests for dismissal and sanctions filed July 31, 1984 by Alioto and Barton indicates that plaintiffs have requested leave "to dismiss class action allegations" and "in the alternative . . . that the complaint be dismissed as the procedural predicate to asserting counterclaims or third party claims against the broker-defendants;" they then withdrew their motion August 7, 1984; and the joint memorandum of plaintiffs Unioil and Richards in opposition to defendants' request for awards of costs,

attorneys' fees and sanctions indicates that they intend to file separate amended complaints articulating these plaintiffs' claims less ambiguously and without conflict. Memo, page 3, line 15. Under these circumstances, defendants' request for sanctions is not mooted, as counsel contends, but is substantiated.

Although counsel argues that they sought to dismiss the class allegation because of a conflict of interest which arose when the *Wilson, Wolfe* and *Deutsch* class action against Unioil and Richards were filed, this does not excuse (a) their not having anticipated a conflict at the time of bringing and signing the complaint, or (b) their not simply withdrawing claims, if they legitimately believed the class aspects of the complaint were well-grounded in fact and were not interposed for an improper purpose. Given the Alioto firm's holding itself out as experienced and specialized in complex business litigation, they clearly should have known of the potential for conflict inherent in their pursuing a class action in the name of the company on behalf of the shareholders, had their been any meaningful investigation of independent shareholder claims prior to proceeding. Moreover, the fact that the *potential* for conflict no longer exists by virtue of plaintiffs having retained separate counsel is immaterial on the issue of whether it did when the pleadings were filed and while the matter was initially prosecuted.

At the hearing on defendants' motion Alioto argued (a) that in an antitrust case it would be impossible for plaintiff's counsel to consult with the co-conspirators before bringing suit; (b) that the charges made have merit; and (c) that defendants have not been prejudiced because the claim will be pursued against the broker defendants. As to the first, suffice it to say that this is not primarily an antitrust action and the issue is not

about contacting conspirators, but consulting with one's own client. So far as the second point is concerned, the individual claims may indeed have merit but counsel did not even argue that the *class action* claims do. It is as to them that the violations of Rule 11 pertain. Finally, defendants have been prejudiced because they were compelled to respond to class pleadings, to initiate class discovery and to oppose counsel's attempt to dismiss the class allegations, all of which would have been obviated had the Rule 11 certification been taken seriously.

Fourth, plaintiffs filed their notice of dismissal without apparently having considered or researched the impact of F.R.Civ.P. Rule 23(e). [See Memo in Support, page 8, lines 104.]

Finally, there is no substantial evidence that Alioto so acted at the direction of Unioil, Richards or the Heck interests. Their declarations indicate that they relied upon Alioto for expertise in how to proceed in matters of this sort.

Accordingly it is ordered as follows:

1. Plaintiffs Heck & Heck, Heck Oil Co. and Zelezny's motion for approval of dismissal under Rules 23(e) and 41(a)(2) shall be granted without prejudice as to their individual claims, and without prejudice as to their representative claims only on condition that notice be given in a form approved by counsel for plaintiffs and defendants in the *Wilson, Wolfe* and *Deutsch* class action and at the time of notice, if any, required to be given in these actions to all Unioil shareholders to whom the March 29, 1984 notice to shareholders was sent, and on the further condition that plaintiffs and/or Alioto and Barton reimburse defendants for their costs and expenses, including attorneys' fees, reasonably incurred

in defending against the class action claims. Costs of the notice shall be personally advanced by counsel in accordance with Local Rule 18.5.1.

2. Defendants' motion for sanctions as to Alioto, in connection with filing the class action complaint shall be granted. The sanctions shall be in the amount of the reasonable expenses incurred because of the filing of these pleadings, in cluding reasonable attorneys' fees, as determined by the court in accordance with the criteria set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied sub nom Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), after the exercise of billing judgment by counsel for defendants to eliminate inappropriate duplication of effort, and after crediting whatever reimbursement is made in accordance with the court's order conditionally approving plaintiffs' voluntary dismissal.

3. The defendants' justification for attorneys' fees shall be referred to a Magistrate for determination in accordance with this Order.

4. The sanctions so determined shall be paid by Alioto no later than 30 days after entry of this Court's order approving the findings of the Magistrate.

DATED: November 21, 1984.

Pamela Ann Rymer
United States District Judge

JAN 21 1985

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNIOIL, INC.; MELVIN LLOYD RICHARDS, etc., et al., Plaintiffs, vs. E. F. HUTTON & CO., INC., etc., et al., Defendants.	NO. CV 84-1833 -PAR(Bx) ORDER

On November 21, 1984 the court issued a Memorandum of Decision (a) granting plaintiffs' motion for approval of dismissal without prejudice as to their individual claims and, and without prejudice as to their representative claims on condition that notice be given to Unioil shareholders and that plaintiffs and/or their counsel, reimburse defendants for their costs and expenses, including attorneys' fees, reasonably incurred in defending against the class action claims of the complaint; and (b) imposing sanctions on Alioto &

Alioto ("Alioto") for violations Rule 11 of the Federal Rules of Civil Procedure. Alioto has moved to reconsider on the ground that there was "a manifest showing of a failure to consider material facts presented to the Court *before* such decision," Local Rule 7.16(c)(emphasis added), and although not so stated in the Notice or supported in the Memorandum, that relief from the "final order" should be granted for some other reason justifying it, F.R.Civ.P. 60(b). Having considered the papers submitted in support of the motion to reconsider, and having issued a written tentative ruling and heard argument of Joseph L. Alioto, the court concludes that the motion to reconsider must be denied.

The moving papers nowhere indicate any fact which was brought to the court's attention *before* its decision was rendered which was not considered. The court's written tentative ruling, issued in advance of argument, was rather extensive in its listing of the facts upon which it was inclined to award the sanctions requested; oral argument by Joseph M. Alioto was extensive, as I believe was the court's exchange of views with him; and the Court's Memorandum of Decision and Order was equally extensive in reciting both the facts and law upon which it was based.

The only "facts" which are presented in connection with Alioto's motion to reconsider which were not considered before were not so considered because they were not brought to the court's attention, despite the fact that both Joseph L. Alioto and Joseph M. Alioto submitted declarations in support of their position to defendants' original motions. Those "facts" are (1) that Joseph L. Alioto sent a draft of the complaint to referring counsel Barton before filing it, and added Zelezny's name as a representative party plaintiff thereafter at Barton's

suggestion; and (2) that Minneapolis attorney Daniel L. Shulman was asked for and gave advice to Alioto about a potential conflict of interest sometime in May, 1984. These clearly are not newly discovered; nor does there appear to the Court to be any reason why they could not, and should not, have been presented to it in connection with the opposition to defendants' requests for sanctions. That they were not leads the Court to question both credibility, and counsel's good faith in opposing the motions originally and in moving on this basis to have the Court's ruling considered.

Even had these "facts" been timely presented, and even were the Court to consider them now, nothing about them suggests that the ruling was unwarranted. To the contrary, the rationale upon which the Court predicated its earlier finding of violation of Rule 11 is substantiated.

Reliance on forwarding counsel. Although reliance on forwarding counsel is certainly *one* of the factors which may be taken into account, *see e.g.,* Advisory Committee's Note; *Huettig & Schromm v. Landscape Contractors Council*, 582 F.Supp. 1519 (N.D. Cal. 1984), it is not the *only* factor. Moreover there is nothing in this record to indicate that Alioto's reliance on the referring counsel in this case was justified. It is uncontroverted that the referring counsel himself took no directions from Zelezny; Alioto had never previously worked with that counsel (or with the clients); and there is not a single ioto of evidence from which it could reasonably be inferred that the Alioto firm knew anything about Barton, his experience in matters of this sort, or *his* investigation. Mr. Alioto conceded at the hearing that he had asked Barton no questions which would have elicited such information about Zelezny as whether he was a sophisticated investor, relied upon any

representations by any of the defendants, or would fairly and adequately represent the class. Thus when the Rule 11 certificate was executed there were no facts known to Alioto about Zelezny's Rule 23 qualifications; and the only fact bearing on the merits of the pleading known to the firm at the time of filing was that Zelezny had sold Unioil stock the day after the Wall Street Journal article. Finally, it is not without significance that the Heck & Heck Declaration, signed by referring counsel Barton August 10, 1984 in connection with the opposition to defendants' motions, stated that "*Mr. Alioto was to be the main counsel and would decide all important matters such as* direction, *parties* and strategy of this lawsuit, while Mr. Barton, who was already informed of the information surrounding this case, would act to help Mr. Alioto in obtaining information from shareholders, coordination and perform a modicum of other acts that were necessary." (Emphasis added.) Thus it was assumed by referring counsel that Joseph L. Alioto would be responsible for determining important matters such as who should be and who should not be, a party.

Consultation with attorney Shulman. Whether or not Alioto consulted with Shulman and regardless of the advice Shulman may have given, is immaterial to the only issue of significance before the court: *i.e.*, the investigation which should have been, but was not, done *before* the complaint was filed. Had Alioto made any such investigation, it would have been discovered that Zelezny was a sophisticated purchaser, never relied on any statements made by any defendant, and that his story was in many critical respects disparate from that set forth in the complaint, *see* Memorandum of Decision and Order ¶¶ 15-17, thus belying Joseph L. Alioto's averment in his declaration submitted in support of this

motion that the "facts" upon which the complaint was filed "applied to every shareholder." Moreover if any such investigation had been conducted, including a careful reading and follow-up of the February 7, 1984 Wall Street Journal article which aluded both to unhappy shareholders and an unhappy SEC, no reasonable let alone experienced counsel could have concluded that no shareholder class action was possible and no conflict inherent in representing both Unioil and shareholders as class action plaintiffs — without so much as talking to, or being assured that some other counsel had talked to, a shareholder who was independent of the company. Finally, although both the declarations and memorandum submitted in connection with this motion to reconsider persist in asserting that the complaint was brought in behalf of Unioil for itself and Richards for himself, *see* Joseph L. Alioto Dec'l. p. 4; Memorandum, p. 1, that plainly is not the case. *See* Complaint, ¶ 6; Memorandum in support of motion for dismissal, p. 2:4-8, 15-17 ("the plaintiffs asserted the claims in their complaint both as individual claims, and as class action claims, brought on behalf of a class consisting of Unioil shareholders.") Thus the only materiality of the Shulman Declaration is its implication that his consultation was with respect to the propriety of *Unioil's* prosecuting a class action. The Court therefore finds counsel's lack of candor a further ground upon which to invoke the sanctions of Rule 11.[1]

At argument counsel advanced three items which he suggested the court had misapprehended. First, that this is not primarily an antitrust case. Whether it is "primarily" an antitrust case is beside the point; that it is *also a* securities case, with pendent claims of fraud and misrepresentation, is the point. Each of those claims requires reliance as a necessary element of proof. Named

plaintiff Zelezny in his deposition, taken but a few weeks after the complaint averring *his* reliance was filed, testified instead to his *non*-reliance. There is no explanation in the record for why this critical fact would not have been uncovered had counsel executing the Rule 11 certificate inquired of Zelezny directly, or asked referring counsel to do so. Second, that Zelezny's deposition contradicted a fact which was alleged. Clearly it did with respect to reliance. Third, that paragraphs 9 and 10 of the complaint, which designate Zelezny and Heck as representatives of the class, should be taken at face value. To the court, and doubtless to counsel for defendants — and obviously also to consulting counsel Shulman — paragraph 6 of the complaint alleges that all plaintiffs, including Unioil and Richards, are class representatives. In any event these matters were considered by the court before its prior ruling and none was misapprehended so as to warrant a reconsideration.

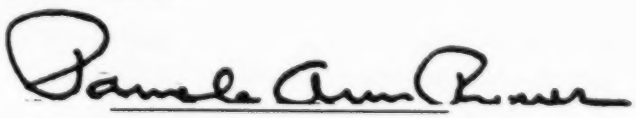
Not only is there a total lack of any showing that the court failed to consider a material fact presented to it, but there also is no new law relied upon by Alioto which was not considered by the court. Instead Alioto reasserts and reargues *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), which was asserted and argued before and which the court has already considered and rejected as the applicable authority, its having been decided before the amendment to Rule 11. In so doing Alioto does not cite to *any* post-Rule 11 authority, *e.g.*, *Huettig & Schromm; Heimbaugh v. City & County of San Francisco*, 591 F.Supp. 1573 (N.D. Cal. 1984); *Larkin v. Heckler*, 584 F.Supp. 512 (N.D. Cal. 1984); *Golden Eagle v. Burroughs Corp.*, 103 F.R.D. 124 (N.D. Cal. 1984) to cite only those by courts in this circuit. These, together with the Rule itself and the Advisory Committee's Notes, make it clear that the bad faith

standard of *Nemeroff* is no longer a criteria. To reargue *Nemeroff* under these circumstances (with no intervening authority which favors Alioto's position and in the face of authority which controverts it) is tantamount to bad faith, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *United States v. Blodgett*, 709 F.2d 608 (9th Cir. 1983), and is at least a reckless disregard for the judicial process within the meaning of 28 U.S.C. § 1927.

Because the motion to reconsider does not meet the requirements of Local Rule 7.16 the Court shall not reconsider its prior ruling. For that reason also, Local Rule 7.19 and 27.1 are implicated. In addition, since the motion to reconsider in substantial part replicates arguments advanced in the original opposition, and to the extent that it does not relies on "facts" known to the proponents prior to consideration of the motion but brought forward as a second shot, this litigation has been unnecessarily and unreasonably multiplied. Thus § 1927 is implicated. Accordingly it is ordered that sanctions in the amount of attorneys' fees, costs and expenses reasonably attributable to opposing the motion to reconsider shall be awarded. Counsel for the opposing parties are to submit substantiation to the Magistrate in accordance with a schedule to be arranged with his clerk. Once the Magistrate's recommendation is received for approval and action has been taken on it by this Court, a final Order reflecting this decision, together with the prior decision, shall be entered.

IT IS SO ORDERED.

DATED: January 14, 1985.



Pamela Ann Rymer
United States District Judge

FOOTNOTE

---

[1]In this connection the Court is also constrained to note that contrary to what Alioto implies, there are several reported opinions which appear to question the conduct of the firm. *See, e.g., PFEL v. R.J. Reynolds*, 1981-2 Trade Cas. ¶ 64,412 (N.D. Cal. 1981); *Syufy Enterprises v. Columbia Pictures Industries, Inc.*, 1978-2 Trade Cas. ¶ 62,710 (D. Utah, 1978); *Davis v. Alioto*, ___ Cal.App.3d ___ Further, although Joseph L. Alioto states under oath in his Declaration in Opposition to Defendants' Response that among the material facts in the Court's opinion which are "unfounded" are "that our office 'held itself out' as an experienced 'class action' firm," Dec'l. p. 2:16-17, and that "our office has not 'held itself out' as experts in any field, let alone 'class action' experts," Id. at 4:16-17, the Memorandum in support of the motion to reconsider states as the first of the "Basic Facts" that "Joseph L. Alioto is an experienced and prominent attorney known to specialize in complex business litigation, including antitrust, securities and class action cases," Memorandum, p. 3:20-22, and the complaint alleges that plaintiffs' attorneys are "skilled and experienced in class action and civil litigation." Complaint, ¶ 6.

FILED

JUN - 6 1985

CLERK, U.S. DISTRICT COURT
...TRAL DISTRICT ... OF CALIF...
DEPU

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNIOIL, INC., et al.,	)	NO. CV 84-1833
	)	PAR (Bx)
Plaintiffs,	)	
	)	[~~PROPOSED~~] ORDER RE
vs.	)	AWARDS OF COSTS,
	)	EXPENSES, AND ATTOR-
E.F. HUTTON & CO., INC.	)	NEYS' FEES PURSUANT
et al.,	)	TO ORDERS OF
	)	NOVEMBER 28, 1984 AND
Defendants.	)	JANUARY 14, 1985 AND
	)	FINDINGS AND RECOM-
	)	MENDATION OF
	)	MAGISTRATE

On November 28, 1984, this Court entered an Order (a) granting the motion of plaintiffs Heck & Heck Inc. ("Heck & Heck), Heck Oil Company, Inc. ("Heck Oil"), and Mark Zelezny ("Zelezny") for approval of dismissal of this action, without prejudice as to their individual claims and without prejudice as to their representative claims, on the condition that notice be given to the shareholders of Unioil, Inc. and that plaintiffs and/or

their counsel, Joseph L. Alioto of Alioto & Alioto ("Alioto") and Donald Barton ("Barton"), reimburse defendants for their costs and expenses, including attorneys' fees, "reasonably incurred in defending against the class action claims," and (b) imposing sanctions against Alioto, "in the amount of the reasonable expenses incurred because of the filing of these pleadings, including reasonable attorneys' fees," for Alioto's violation of Rule 11 of the Federal Rules of Civil Procedure. (Memorandum of Decision, page 14.)

On January 14, 1985, this Court denied Alioto's motion to reconsider the Court's Order of November 28, 1984, and awarded sanctions to defendants "in the amount of attorneys' fees, costs and expenses reasonably attributable to opposing the motion to reconsider." (Order, page 7.)

Pursuant to the above-mentioned Orders, defendants submitted, for review by Magistrate Volney V. Brown, substantia tion of the amounts of attorneys' fees, costs and expenses to be awarded under such Orders. On May 16, 1985, Magistrate Brown filed Findings and Recommendation of Magistrate as to Reimburse-ment and Sanctions. On May ___, 1985, Magistrate Brown amended said Findings and Recommendation nunc pro tunc to correct certain clerical errors.

Pursuant to this Court's Orders of November 28, 1984 and January 14, 1985, and the Findings and Recommendation of Magistrate Brown, as amended,

IT IS HEREBY ORDERED that:

1. The Findings and Recommendation of Magistrate as to Reimbursement and Sanctions dated May 16, 1985, as amended nunc pro tunc per Order dated May ___, 1985, are hereby confirmed.

2. Plaintiffs Heck & Heck, Heck Oil and Zelezny and/or their counsel, Alioto and Barton, shall reimburse to defendants the following amounts as a condition of the voluntary dismissal without prejudice of their class action claims:

Defendant(s)	Amount to be Paid
Donaldson, Lufkin & Jenrette Securities Corporation	$ 89,844.51
Shearson/American Express, Inc.; Oppenheimer & Co., Inc.	18,025.18
E.F. Hutton & Co., Inc.; Richard Jacoby; Haim Pekelis	27,904.00
Kurt Feshbach; Stockbridge Partners, Inc.	30,001.15

3. Within thirty days of the entry of this Order, Alioto shall pay to defendants, as sanctions under Rule 11 of the Federal Rules of Civil Procedure and under this Court's Order of January 14, 1985, the following amounts, after crediting any reimbursement received by defendants within said thirty days pursuant to Item 2 above:

Defendant(s)	Amount to be Paid
Donaldson, Lufkin & Jenrette Securities Corporation	$ 160,001.10
Shearson/American Express Inc.; Oppenheimer & Co., Inc.	30,545.63
E.F. Hutton & Co., Inc.; Richard Jacoby; Haim Pekelis	47,212.82
Kurt Feshbach; Stockbridge Partners, Inc.	56,381.55

4. In the event of any dispute among plaintiffs and/or their counsel relating to the ultimate allocation, among themselves, of amounts paid or to be paid to defendants hereunder plaintiffs and/or their counsel shall meet and confer to resolve any such dispute; and, in the event that the parties are unable to resolve any such difference, they shall make application to the Magistrate for resolution thereof.

5. Resolution of any dispute provided for in paragraph 4 shall not delay the payment to defendants required of Alioto under paragraph 3.

DATED: May ___, 1987

Honorable Pamela Ann Rymer
United States District Judge

Presented by:

DATED: May ___, 1987

TUTTLE & TAYLOR Incorporated
C. STEPHEN HOWARD
SUSAN L. HOFFMAN
JULIE FOX BLACKSHAW

JULIE FOX BLACKSHAW, a member of the law firm of TUTTLE & TAYLOR Incorporated, Attorneys for Defendant Donaldson, Lufkin & Jenrette Securities Corporation

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 26, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk, California Court
of Appeals
Ninth Judicial Circuit
Seventh & Mission Streets
P.O. Box 547
San Francisco,
California 94101

Clerk of the United States
District Court for
the Hon. Pamela A. Rymer
34 Civic Center Plaza
Room 111
Santa Ana, California 97201

Joseph L. Alioto, Esq.
Alioto & Alioto
650 California Street
23rd Floor
San Francisco,
California 94108

H. Donald Harris, Jr., Esq.
Lillick, McHose & Charles
Two Embarcadero Center
Suite 2600
San Francisco, California 94111

Michael London, Esq.
Henderson, Robers, Schefield
& Henderson
P.O. Box 22257
Santa Barbara, California 93121

C. Stephen Howard, Esq.
Wayne Braveman, Esq.
Susan L. Hoffman, Esq.
Tuttle & Taylor
609 South Grand Avenue
Los Angeles, California 90017

Terry Ross, Esq.
Ben Suter, Esq.
Keesel, Young & Logan
Pier F - Berth 203
P.O. Box 1730
Long Beach, California 90801

Tracy R. Kirkham, Esq.
Hennigan & Mercer
611 W. 6th Street
28th Floor
Los Angeles, California 90017

Mr. Melvin Lloyd Richards
In Pro Per
c/o Unioil, Inc.
5635 San Fernando Road
Glendale, California 91202

Frank Kaplan, Esq.
Alschuler, Grossman & Pines
1880 Century Park East
12th Floor
Los Angeles, California 90067

Judith K. Otamura-Kester, Esq.
Morgan, Lewis & Bockius
Counselors at Law
801 South Grand Avenue
Los Angeles,
California 90017-3189

Duane S. Musfelt
Sharon S. Chandler
Lewis, D'Amato, Brisbois
& Bisgaard
601 California Street
Suite 1900
San Francisco, California 94108

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 26, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

(2) (2)

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1918 and No. 86-1894

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALIOTO & ALIOTO, et al.,
Petitioners,

DONALD A. BARTON,
Petitioner,

VS.

E. F. HUTTON & CO., INC., et al.,
Respondents.

JOINT AND CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

C. STEPHEN HOWARD
Counsel of Record
WAYNE STEPHEN BRAVEMAN
SUSAN L. HOFFMAN
TUTTLE & TAYLOR INCORPORATED
355 South Grand Avenue
Los Angeles, Calif. 90071
(213) 683-0600

Attorneys for Respondent Donaldson, Lufkin & Jenrette Securities Corporation

C. G. GORDON MARTIN
PAUL A. RICHLER
JUDITH K. OTAMURA-KESTER
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Los Angeles, Calif. 90017
(213) 612-2500

Attorneys for Respondents E. F. Hutton & Co., Inc. Richard Jacoby and Haim Pekalis

BEN SUTER
TERRY ROSS
KEESAL, YOUNG & LOGAN
455 The Embarcadero
San Francisco, Calif. 94111
(415) 989-0616

Attorneys for Respondents, Shearson/American Express, Inc. and Oppenheimer & Co., Inc.

FRANK KAPLAN
ALSCHULER, GROSSMAN & PINES
1880 Century Park East
Los Angeles, Calif. 90067
(213) 277-1226

Attorneys for Respondents, Kurt Feshbach and Stockbridge Partners, Inc.

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTIONS PRESENTED

The petitions for certiorari in this case raise two separate and distinct issues.

1. *In No. 86-1918:* Whether the Ninth Circuit's unanimous decision affirming the district court's award of sanctions under Fed. R. Civ. P. 11 against an attorney for failing to make a "reasonable inquiry" into whether a class action complaint under the federal securities laws was "well grounded in fact" is appropriate for review by this Court, when it: (a) rests on findings of fact by the district court, unanimously affirmed by the Court of Appeal, that are not subject to review by this Court; (b) involves no important questions of federal law; and (c) involves application of well-settled law under Rule 11 as to which there is no conflict among the circuits.

2. *In No. 86-1918 and No. 86-1894:* Whether the Ninth Circuit's unanimous ruling that the district court's imposition of conditions on the granting of plaintiffs' motion for dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(2) is not appealable is appropriate for review by this Court when: (a) as the Ninth Circuit found, petitioners elected below to acquiesce in the conditions; (b) as the Ninth Circuit ruled, petitioners may seek review by way of petition for writ of mandamus; (c) the Ninth Circuit's ruling raises no important questions of federal law; and (d) the Ninth Circuit's ruling involves no conflict among the circuits.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement of the Case	1
A. Events Prior To The Filing Of The Complaint	3
B. The Complaint	4
C. Alioto's Failure To Investigate Prior To Filing The Complaint	5
D. Events Subsequent To The Filing Of The Complaint	7
E. The Decisions Below	9
Summary of Reasons for Denying the Writs	12
A. Certiorari Should Be Denied In No. 86-1918 As To The Rule 11 Sanctions	12
B. Certiorari Should Be Denied In No. 86-1894 And No. 86-1918 As To The Rule 41(a)(2) Conditions	13
Reasons for Denying the Writs	14
A. Review Should Be Denied In No. 86-1918 Because The Rule 11 Sanctions Involve Fact-Based Application of Well-Settled Law Which Raises No Important Questions of Federal Law and As To Which There Is No Conflict Among the Circuits	14
1. The Rule 11 sanctions involve fact-based application of well-settled law raising no important questions of federal law	14
2. There is no conflict among the circuits on any Rule 11 issue in this case	20

TABLE OF CONTENTS

Page

B. Review Should Be Denied In No. 86-1894 and No. 86-1918 Because The Ruling That The Rule 41(a)(2) Conditions In This Case Are Not Appealable Raises No Important Questions of Federal Law and Involves No Conflict Among the Circuits 23

1. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not raise any important questions of federal law 24

2. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not involve a conflict among the circuits 26

Conclusion 28

TABLE OF AUTHORITIES CITED

Cases

Page

Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) 15, 20, 21, 22, 23

Blackwell v. Department of Offender Rehabilitation, 807 F.2d 914 (11th Cir. 1987) 22

Bowers v. St. Louis Sw. Ry. Co., 668 F.2d 369 (8th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) ... 26

Eastway Construction Co. v. City of New York, 762 F.2d 243 (2d Cir. 1985) 20, 21

Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985) ... 15

Frazier v. Cast, 771 F.2d 259 (7th Cir. 1985) 15, 20

G.A.F. Corp. v. Transamerica Insurance Co., 665 F.2d 364 (D.C. Cir. 1981) 24, 26

Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986), *rehearing and rehearing en banc denied*, 809 F.2d 584 (9th Cir. 1987) 22, 23

Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949) 16

Lau v. Glendora Unified School District, 792 F.2d 929 (9th Cir. 1986) 24, 25

LeCompte v. Mr. Chip Inc., 528 F.2d 601 (5th Cir. 1976) 25, 26

Lieb v. Topstone Industries, 788 F.2d 151 (3d Cir. 1986) 20, 21

McLaughlin v. Bradlee, 602 F.Supp. 1412 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986) ... 20

McLaughlin v. Cheshire, 676 F.2d 855 (D.C. Cir. 1982) 24, 26

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987) 22, 23

Quiros v. Hernandez Colon, 800 F.2d 1 (1st Cir. 1986) 22

Robinson v. National Cash Register, 808 F.2d 1119 (5th Cir. 1987) 20, 21

TABLE OF AUTHORITIES CITED

Cases

	Page
Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985)	20
Scholl v. Felmont Oil Corp., 327 F.2d 697 (6th Cir. 1964)	26
Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783 (5th Cir. 1986)	18, 19
Stevens v. Lawyers Mutual Liability Insurance Co., 789 F.2d 1056 (4th Cir. 1986)	20
Suslick v. Rothschild Securities Corp., 741 F.2d 1000 (7th Cir. 1984)	20
Thomas v. Capital Securities Services, Inc., 812 F.2d 984 (5th Cir. 1987)	18, 19, 22
United States v. Doe, 465 U.S. 605 (1984)	16
United States v. Winans, 612 F.Supp. 827 (S.D.N.Y. 1985), *aff'd in part and reversed in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S. Ct. 666 (1986)	3
Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C. Cir. 1985)	15, 17, 20, 21
Yagman, In re Matter of, 796 F.2d 1165, *rehearing denied and amended*, 803 F.2d 1085 (9th Cir. 1986)	19
Yoffe v. Keller Industries, Inc., 580 F.2d 126, *rehearing denied*, 582 F.2d 982 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979)	25, 26, 27
Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986)	15, 17, 20, 21

Rules

Federal Rules of Civil Procedure, Rule 11 ..... *passim*

Federal Rules of Civil Procedure, Rule 23(a) 5, 19

Federal Rules of Civil Procedure, Rule 23(e) 8

Federal Rules of Civil Procedure, Rule 41(a)(1) 8

TABLE OF AUTHORITIES CITED

Rules

	Page
Federal Rules of Civil Procedure, Rule 41(a)(2)	*passim*
Local Rules of the United States District Court for the Central District of California, Rule 18.4	7
Local Rules of the United States District Court for the Central District of California, Rule 18.5	8
Rules of the Supreme Court of the United States, Rule 17	12
Rules of the Supreme Court of the United States, Rule 17.1	23

Miscellaneous

Advisory Committee Notes to Federal Rules of Civil Procedure, Rule 11	16, 17, 19
Nelkin, *Sanctions Under Amended Rule 11 — Some "Chilling Problems" in the Struggle Between Compensation and Punishment,* 74 Geo. L. J. 1313, 1339-41 (1986)	18

No. 86-1918 and No. 86-1894

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ALIOTO & ALIOTO, et al.,
Petitioners,
DONALD A. BARTON,
Petitioner,
vs.
E. F. HUTTON & CO., INC., et al.,
Respondents.

JOINT AND CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents respectfully request this Court to deny the petitions, in No. 86-1918 and No. 86-1894, for writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In this action, District Judge Pamela A. Rymer, unanimously affirmed by the Ninth Circuit in an opinion by Circuit Judge Clifford A. Wallace (joined by Circuit Judges Jerome Farris and William C. Canby), imposed sanctions against petitioner Alioto & Alioto ("Alioto") under Fed. R. Civ. P. 11 ("Rule 11") based on Alioto's filing, without the requisite "reasonable inquiry," of class action claims not "well grounded in fact." In *No. 86-1918*, Alioto seeks review of the Rule 11 sanctions.

Separately and independently, as a condition to plaintiffs' belated effort voluntarily to dismiss those class action claims and certain individual claims without prejudice — thereby depriving respondents of a favorable adjudication on the merits and preserving plaintiffs' option to sue again — Judge Rymer required pursuant to Fed. R. Civ. P. 41(a)(2) ("Rule 41(a)(2)") that plaintiffs pay respondents their reasonable attorneys' fees and costs incurred in defending against the class action claims. The Ninth Circuit found that plaintiffs had acquiesced in the conditions by failing to withdraw their motion for dismissal without prejudice, and ruled the conditions non-appealable. In *No. 86-1894,* petitioner Donald A. Barton ("Barton") seeks review of this holding, as do petitioners in *No. 86-1918.*

Contrary to petitioners' arguments, which rely on wholesale mischaracterizations of the record, the Rule 11 sanctions rest squarely on the district court's extensive factual findings, unanimously affirmed by the Ninth Circuit, regarding Alioto's unquestioned misconduct and on application of well-settled principles of law under Rule 11. And the Rule 41(a)(2) conditions imposed on plaintiffs' dismissal without prejudice of their class action claims follow settled precedent recognizing that such conditions are appropriate to compensate defendants for the fact that they are foreclosed from obtaining a favorable adjudication on the merits, and for work done in defense of the plaintiff's claims which will not prove useful if and when those claims are reasserted in another action. As the Ninth Circuit ruled, particularly where, as here, a plaintiff acquiesces in such conditions, the imposition of conditions is not appealable, but review may be sought by petition for writ of mandamus.

To correct petitioners' misstatements, respondents summarize below the facts as found by the district court

and affirmed by the Ninth Circuit, and the grounds for the decisions below.

A. Events Prior To The Filing Of The Complaint.

During 1983, fueled by a series of optimistic public announcements by the company, the publicly traded stock of petitioner Unioil, Inc. ("Unioil") rose from $1.25 per share in the early part of the year to a high of $13.75 per share in mid-December 1983. In February 1984, Unioil's stock was trading at $10.00 per share. App. A2, B1.* On February 7, 1984, the Wall Street Journal published an article raising serious doubts about the accuracy of the company's public announcements, suggesting that Unioil was being investigated by the Securities and Exchange Commission ("the SEC"), and disclosing that Unioil's principal executive, plaintiff Melvin Lloyd Richards ("Richards"), had twice previously been cited by the SEC for making false and misleading statements.[1] Commencing shortly before publication of the article, Unioil's stock ultimately tumbled from $10.00 per share to $2.625 per share. App. A2, B2.

The disclosures in the Wall Street Journal article made highly likely — as subsequently occurred — the filing of

---

*The Petition in No. 86-1918 is cited as "Alioto Pet.," and the Petition in No. 86-1894 as "Barton Pet." The Appendices to the Alioto Petition are cited as "App. ____," and the Appendices to the Barton Petition as "Barton App. ____."

[1]Alioto falsely states that the author of the Wall Street Journal article, R. Foster Winans, was later convicted of securities fraud for disseminating false information in his articles. Winans was in fact convicted for disclosing *true* information to traders just prior to the publication of that information. *United States v. Winans*, 612 F. Supp. 827, 838 (S.D.N.Y. 1985), *aff'd in part and rev'd in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S.Ct. 666 (1986). Winans has never been accused of any wrongdoing in connection with the Unioil article.

shareholder class action lawsuits against Unioil and its management. *See* App. A4, A14, B7-B8, B9-B10. In what now appears to have been an effort to forestall such lawsuits, on February 22, 1984, Unioil issued a press release announcing that it and a group of its shareholders had retained Alioto to institute a class action lawsuit alleging that the decline in Unioil's stock was due to market manipulation by a group of national brokerage firms and individuals associated therewith (respondents herein). App. A3, B2. Alioto is, and represented itself in this action as, experienced and specialized in complex business litigation. App. A12, B5, B9.

B. The Complaint.

The class action complaint was filed one month subsequent to the press release, on March 21, 1984. App. A2, B3. Named as plaintiffs were Unioil, Richards, petitioners Heck Oil Co. ("Heck Oil") and Heck & Heck, Inc. ("Heck & Heck"), along with petitioner Mark Zelezny ("Zelezny"). App. A2. Heck Oil and Heck & Heck were major shareholders of Unioil, and, as Alioto had reason to know, closely aligned with Unioil management. App. A2, A14, B5.[2] Zelezny was a stockbroker and shareholder of Unioil. App. A2, B2. Attorneys of record were Alioto and Barton. Alioto signed the complaint. App. A2, B3.

The complaint pled all of its substantive legal claims (except for a defamation claim brought individually by Unioil and Richards) as claims on behalf of a class of Unioil shareholders, and all plaintiffs — Unioil, Richards, Heck Oil and Heck & Heck, as well as Zelezny — were alleged to be representatives of the putative class. App.

---

[2]As Judge Rymer found, it was at Heck Oil's and Heck & Heck's suggestion that Unioil and Richards contacted Alioto, and it was Heck Oil and Heck & Heck who posted the $100,000.00 retainer required by Alioto. App. B5.

A2, B5, B9. The complaint alleged that, in violation of federal securities laws: (a) respondents had illegally depressed the price of Unioil stock between December 1, 1983 and February 25, 1984 by selling the stock short and by spreading false negative rumors about Unioil; (b) plaintiffs had been induced by respondents' alleged false statements to sell their Unioil stock and did so at depressed prices; and (c) plaintiffs had sold their Unioil stock in reliance on respondents' alleged statements. App. A2, A3, B4-B5. The complaint also alleged federal antitrust and RICO claims, and claims for fraud and deceit under California law (which again specifically pled plaintiffs' reliance on respondents' alleged statements). Damages in excess of $50,000,000.00 were sought. App. A2, A3, A12, A16, B4-B5.

C. Alioto's Failure To Investigate Prior To Filing The Complaint.

Because Zelezny was the only named plaintiff with the appearance of independence from Unioil and its management, Zelezny's role in this class action litigation was critical. App. A2. As both Judge Rymer and the Ninth Circuit found, any reasonably competent business attorney would have realized, upon reading the Wall Street Journal article, the strong possibility that Unioil shareholders would sue Unioil and its management, and thus at a minimum have taken steps to investigate and insure that any class claims were represented by a plaintiff independent of Unioil and otherwise qualified under Fed. R. Civ. P. 23(a). App. A14, B9-B10. Indeed, within three weeks of the filing of this action, three separate class action lawsuits were filed by Unioil shareholders against Unioil and its management (including Richards). Each action accused Unioil's management of inflating the price of Unioil stock by making false optimistic announcements about the company. App. A4, B6, B9.

But as Judge Rymer and the Ninth Circuit found, Alioto did not so investigate. Alioto's description of the purported nature and extent of its pre-filing investigation, Alioto Pet. at 6-8, has no support in the record, and is belied by Judge Rymer's factual findings, affirmed by the Ninth Circuit.[3]

Despite a substantial retainer, ample time for investigation, and the fact that it was experienced and specialized in complex business litigation, App. A12, B5, B8, prior to filing the complaint, Alioto did *not* consider the obvious conflict inherent in simultaneously representing both Unioil and its management and a putative class of Unioil shareholders -- much less the impropriety of asserting class claims with Unioil, its management and closely related entities Heck Oil and Heck & Heck as class representatives. App. A14, B8. Moreover, before filing the complaint, Alioto *never* spoke to Zelezny, the only named plaintiff even arguably independent from Unioil and its management; nor did it inquire whether Barton had investigated Zelezny's suitability as a class

---

[3]Thus, there is no basis in the record for Alioto's putative factual assertions that prior to filing the complaint, Alioto held meetings with certain of the plaintiffs (not including Zelezny), reviewed "voluminous documents," explored the possibility that corporate mismanagement might have explained the drop in Unioil's stock, or "received a large favorable response from shareholders wishing to join the action against the brokers." Alioto Pet. at 7-8. Similarly, there is no record support for Alioto's putative factual assertions regarding: (1) Richards' knowledge and Heck Oil's and Heck & Heck's principal Mr. Thomas Heckenkamp's knowledge of alleged concerted short-selling of Unioil stock; (2) the trading volumes of Unioil stock during the relevant time period; or (3) respondent Feshbach's alleged letters regarding trading in Unioil stock. *Compare* Alioto Pet. at 6-8 (putative factual assertions) *with* App. B8, A1-A5 (district court ruled any such "evidence" inadmissible, and district court's findings of fact affirmed and recited by the Ninth Circuit did not include these putative "facts").

representative. App. A3, A12-A13, B2-B3, B7, B8. All Alioto knew about Zelezny at the time it filed the complaint was that, as Alioto learned from Barton, Zelezny had sold Unioil stock the day after the Wall Street Journal article appeared. App. A3, A12-A13, C3.

D. Events Subsequent To The Filing Of The Complaint.

As required by Central District Local Rule 18.4 (requiring completion of class action discovery within sixty days of the filing of a complaint), respondents immediately initiated an expedited program of discovery on class certification issues. App. B3. On the second day of Zelezny's deposition, Zelezny failed to appear.[4] Instead, Barton announced that Zelezny was withdrawing as a plaintiff. The magistrate ordered Zelezny to complete his deposition, and imposed sanctions. App. A3, B3.

At his resumed deposition, Zelezny flatly contradicted the essential allegations of the complaint. App. A3, B4. Thus:

(1) While the complaint alleged that respondents' alleged short selling had driven down the price of Unioil stock and caused plaintiffs to sell Unioil shares at depressed prices, Zelezny, a professional stockbroker, testified that he was aware of significant short selling in Unioil stock and, following a contrary strategy, *bought not sold*

---

[4]Alioto obscures the circumstances surrounding the Zelezny deposition. Alioto fails to mention that: (1) Alioto never questioned Zelezny or Barton to determine whether or not Zelezny was an appropriate plaintiff or class representative; (2) Zelezny's deposition testimony directly contradicted the allegations of the complaint; (3) the Zelezny deposition took place before any effort by plaintiffs to dismiss their claims without prejudice; and (4) Zelezny sought to escape questioning by refusing to appear for the second day of his deposition. *Compare* Alioto Pet. at 9-10 (purported facts) *with* App. B3-B4 (facts as found by district court) *and id.* A3-A4 (facts affirmed by Ninth Circuit).

Unioil shares, based on his belief that the short sellers would have to buy and eventually drive up the stock price. App. A3, B4.

(2) While the complaint alleged that sales of Unioil stock made by plaintiffs between December 1, 1983 and February 29, 1984 had been at *depressed* prices, Zelezny testified that the price that prevailed during this period, until the February 7, 1984 Wall Street Journal article, was in his view the *fair market price* of the stock. App. A3, B4.

(3) While the complaint alleged that plaintiffs had engaged in Unioil stock transactions in *reliance* on false, negative statements by respondents, Zelezny testified that he had heard no negative statements or rumors about Unioil, false or otherwise, from respondents or anyone else, prior to the Wall Street Journal article, and that he had *never bought or sold Unioil stock in reliance on anything said by any respondent.* App. at A3, B4-B5.

Zelezny's deposition was scheduled for another session on May 15, 1984. On May 14, 1984, Barton announced that Zelezny would once again not appear for his deposition, that neither plaintiffs nor their attorneys would appear for any further depositions, and that plaintiffs would voluntarily dismiss the complaint. App. A3-A4, B4. On May 15, 1984, plaintiffs filed a notice purporting to dismiss their action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1), maintaining that no court approval was necessary. App. A4, B4. One respondent objected on the ground that Rule 41(a)(2), Fed. R. Civ. P. 23(e) and Central District Local Rule 18.5 required court approval before a putative class action could be dismissed. App. A4, B4.

On May 24, 1984, plaintiffs filed a motion pursuant to Rule 41(a)(2) seeking court approval of dismissal of the

entire action, both class claims and individual claims, *without prejudice* — i.e., preserving their right to sue respondents again if they chose to do so.[5] App. A4, B4. In response, respondents moved for imposition of conditions on any such dismissal: attorneys' fees and costs for their defense to the extent those fees were for work which would not be useful if plaintiffs refiled any claims. Respondents also sought sanctions under Rule 11 based on Alioto having filed the class action complaint without the required reasonable inquiry into the facts. App. at A4, B4.

Unioil and Richards (through newly retained counsel) thereupon withdrew their motion seeking court approval of dismissal of their individual claims. App. A4, B4. Directly contrary to Alioto's assertion, Alioto Pet. at 27, Unioil and Richards took no further action in the case following the district court's Rule 41(a)(2) and Rule 11 rulings. Their individual claims were subsequently dismissed with prejudice for failure to prosecute. App. A5.

E. The Decisions Below.

Judge Rymer — unanimously affirmed by the Ninth Circuit — ruled that Alioto had violated Rule 11 by, among other actions, failing to conduct the required "reasonable inquiry" into the facts and, as a result, filing a complaint which, as to the critical class action allegations, was not "well grounded in fact." App. at A4-A5, A12-A14, B7-B10, C1-C5. As Judge Rymer concluded:

---

[5]Alioto fails to mention that plaintiffs attempted to dismiss their claims without prejudice and without court approval before filing their Rule 41(a)(2) motion. Alioto likewise fails to specify that the only dismissal ever sought below was a dismissal *without* prejudice. *See, e.g.*, Alioto Pet. at 9.

(1) Alioto had failed "so much as to consult with one of his clients [Zelezny] before bringing a class action in part in his name." App. B7; *see* App. A3, A12.

(2) Had Alioto consulted with Zelezny, "that consultation would or should have readily disclosed that . . . [Zelezny's] experience was contrary to that about which the class was to complain." App. B7; *see* App. A13. Alioto's failure to consult with Zelezny was critical not only because it led Alioto to file a complaint which made factual allegations unsupported in fact, but also because Zelezny was the *only* putative class representative arguably independent from Unioil's management. App. B8; *see* App. A2-A3, A12.

(3) Had Alioto reasonably inquired into the facts — by, for example, conducting any follow-up inquiry regarding the Wall Street Journal article during the one month period between announcing the lawsuit and filing the complaint — it would have realized, as would any reasonably competent business attorney, the conflict inherent in undertaking simultaneous representation of Unioil and its management on the one hand, and a putative class of Unioil shareholders with possible claims against Unioil and its management on the other hand. App. B8, C3-C4, A12, A14.

As Judge Rymer explained:

> [T]here is no substantial evidence to show that plaintiffs' counsel made any reasonable inquiry to determine whether the shareholder class action claims were well-grounded in fact . . . . There was ample time for investigation, but Alioto never discussed the claim he asserted for Zelezny in behalf of the class with him. The importance of doing so is manifest because he [Zelezny] was the only named shareholder with the appearance of independence

> from Unioil. There is no showing that Alioto relied on Barton's having done so, or that Barton did anything more than simply solicit Zelezny as a plaintiff and determine in a cursory way that he had made transactions in Unioil stock. It is implausible that counsel as experienced as Alioto would not have perceived the conflict of interest inherent in representing Unioil and Richards and their purporting to represent Unioil shareholders; or the inappropriateness of Zelezny's serving as a representative plaintiff when his view of the facts *contradicted* those upon which the complaint proceeds.

App. B8 (emphasis in original). *See* App. A2-A3, A12-A14.

As Rule 11 sanctions, Judge Rymer awarded respondents their reasonable attorneys' fees and costs in defending against plaintiffs' claims, and in seeking sanctions (but not for establishing the amount of the sanctions). App. A5, B11, C6. After the filing of detailed documentation and after lengthy proceedings before the magistrate, the district court, adopting the magistrate's findings, set the amount of sanctions awarded against Alioto at $294,141.10. App. A5; Barton App. D3.

Separately and independently, Judge Rymer also granted plaintiffs' motion to dismiss their class action and certain individual claims without prejudice. Under Rule 41(a)(2), the district court imposed as a condition to dismissal without prejudice of the class action claims that plaintiffs and their counsel pay respondents their reasonable costs and expenses (including attorneys' fees) relating to defending the class action allegations — fees for work which would not be useful if and when plaintiffs refiled their claims. App. B11. Again adopting the magistrate's findings, the district court fixed the amount of conditions at $165,774.84. App. A5; Barton App. D3. To

avoid double recovery by respondents under Rules 11 and 41(a)(2), the district court provided that any amounts actually paid to respondents in conditions would reduce the amount Alioto was required to pay in Rule 11 sanctions. App. A5, B11; Barton App. D3-D4.

As the Ninth Circuit found, plaintiffs did not, in response to the Rule 41(a)(2) conditions, elect to forego the conditions by withdrawing their motion for dismissal and pursuing their claims, or by instead taking a dismissal with prejudice. Rather, with full knowledge of their option to withdraw their motion and avoid the conditions, plaintiffs accepted the conditions. App. A6-A7.

On appeal, the Ninth Circuit unanimously affirmed the award of Rule 11 sanctions. App. A10-A16. The Ninth Circuit dismissed the appeal from the Rule 41(a)(2) conditions, unanimously ruling the matter not appealable. App. A5-A10. A petition for rehearing and/or rehearing *en banc* was subsequently denied. App. D1-D2.

SUMMARY OF REASONS FOR DENYING THE WRITS

Under the standards set forth in this Court's Rule 17, neither the imposition of Rule 11 sanctions, for which review is sought in No. 86-1918, nor the Ninth Circuit's ruling that the Rule 41(a)(2) conditions are not appealable, for which review is sought in No. 86-1894 and No. 86-1918, merits review by certiorari.

A. Certiorari Should Be Denied In No. 86-1918 As To The Rule 11 Sanctions.

The award of Rule 11 sanctions does not merit review because it raises no important questions of federal law. To the contrary, the award rests on a well-established and wholly non-controversial component of Rule 11: an attorney's obligation, before signing a pleading, to conduct a

reasonable inquiry to determine that the pleading is well-grounded in fact. As this case demonstrates, application of this prong of Rule 11 is almost wholly fact-based, and there is no warrant for this Court to review the district court's factual findings, unanimously affirmed by the Ninth Circuit, which justified sanctions here. *See* Section A.1 below.

To justify review, petitioners attempt to construct conflicts among the circuits on various issues regarding application of Rule 11. But there is no conflict on the law applicable to the "well grounded in fact" prong of Rule 11. The putative conflicts both do not exist and, even if they did, are wholly irrelevant to this case. *See* Section A.2 below.

B. Certiorari Should Be Denied In No. 86-1894 And No. 86-1918 As To The Rule 41(a)(2) Conditions.

The Ninth Circuit's ruling that the imposition of Rule 41(a)(2) conditions on plaintiffs' dismissal of their claims without prejudice is not appealable does not warrant review by this Court.

No important question of federal law is raised by the non-appealability ruling. Petitioners have not been deprived of any right of review, because: (1) as the Ninth Circuit found, petitioners below acquiesced in the Rule 41(a)(2) conditions when, with knowledge of their option to avoid the conditions by withdrawing their motion for voluntary dismissal, they elected to accept the conditions; and (2) the Ninth Circuit explicitly recognized petitioners' right to seek review by way of petition for writ of mandamus. App. A6-A7, A10. Moreover, in affirming the Rule 11 sanctions, the Ninth Circuit did not, contrary to petitioners' argument, somehow necessarily pass on the validity of the Rule 41(a)(2) conditions. Rather, the

sanctions and conditions were independent, with Alioto required to pay the full amount in Rule 11 sanctions regardless of the validity of the conditions. App. A5, B11; Barton App. D3. *See* Section B.1 below.

Nor does the non-appealability ruling create a conflict among the circuits relevant to this case. The circuits agree that imposition of attorneys' fees conditions under Rule 41(a)(2) is generally not appealable. And while the Fifth Circuit may permit an appeal if a plaintiff has not acquiesced in the conditions and the conditions are "clearly" or "patently unreasonable," the Ninth Circuit recognizes that review may be had under such circumstances by way of petition for writ of mandamus. No circuit would permit review under the circumstances of this case, where plaintiffs did acquiesce and the attorneys' fees conditions are wholly reasonable. *See* Section B.2 below.

REASONS FOR DENYING THE WRITS

A. REVIEW SHOULD BE DENIED IN NO. 86-1918 BECAUSE THE RULE 11 SANCTIONS INVOLVE FACT-BASED APPLICATION OF WELL-SETTLED LAW WHICH RAISES NO IMPORTANT QUESTIONS OF FEDERAL LAW AND AS TO WHICH THERE IS NO CONFLICT AMONG THE CIRCUITS.

1. The Rule 11 sanctions involve fact-based application of well-settled law raising no important questions of federal law.

Rule 11 unambiguously requires an attorney, before filing a pleading, to engage in a "reasonable inquiry" to insure that the pleading is "well grounded in fact." As the Rule states:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record .... The signature of an attorney ... constitutes a certificate ... that the signer has read the pleading, motion, or other paper; that *to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(Emphasis added.)

The circuits are in agreement both as to this requirement, and as to its independence from the additional Rule 11 obligations — *not* at issue here — to investigate whether a pleading is warranted by existing law and to refrain from interposing pleadings or other papers for improper purposes. *See, e.g., Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C. Cir. 1985) ("*Westmoreland*"); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) ("*Zaldivar*"). Along with the Ninth Circuit here, other circuits recognize that Rule 11 sanctions may be awarded based entirely on the "well grounded in fact" requirement. *See Elliott v. Perez*, 751 F.2d 1472, 1480-81 (5th Cir. 1985); *Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986) ("*Albright*"); *Frazier v. Cast*, 771 F.2d 259, 263 (7th Cir. 1985) ("*Frazier*").

Alioto nowhere demonstrates that the "well grounded in fact" clause of Rule 11 has generated any issues of law meriting this Court's attention. To the contrary, as this case demonstrates, application of this clause of Rule 11 is of necessity fact-based, and will always rest on the district court's findings of fact regarding the objective rea-

sonableness of an attorney's pre-filing inquiry, and the bona fides of the relevant pleading.

Absent egregious error, this Court will not review factual findings by a district court that have been upheld by a circuit court. *United States v. Doe*, 465 U.S. 605, 613-14 (1984); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Thus, there is no warrant for this Court to review Judge Rymer's findings of fact, unanimously affirmed by the Ninth Circuit, that Alioto's pre-filing inquiry was not the "reasonable inquiry" required by Rule 11. App. A2-A3, A12-A14, B3, B5, B7-B10. Nor is there any warrant to review Judge Rymer's findings of fact, unanimously affirmed by the Ninth Circuit, that Alioto's failure reasonably to inquire resulted in it filing a complaint the class action allegations of which were not "well grounded in fact." App. A3-A4, A12-A14, B4-B5, B7-B9.[6]

---

[6]Alioto also argues that the amount of sanctions awarded was excessive. Alioto Pet. at 18-19. The amount of sanctions is inappropriate for review by this Court because it is entirely fact-based. "The [district] court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Advisory Committee Notes to Rule 11. In this case, the amount of sanctions was only fixed following painstaking analysis by the district court, assisted by the magistrate. Respondents submitted declarations, accompanied by detailed time records, demonstrating that the fees sought were reasonable and non-duplicative. The magistrate held two separate hearings on the fees to be awarded, and issued formal findings on the issue which were adopted by the district court. *See* App. A16; Barton App. D1-D4. As the Ninth Circuit found, in addition to the fact that "the district court determined the amount after careful proceedings in which Alioto fully participated," App. A16, the award of fees was not excessive "in light of the massive liability that the complaint filed by Alioto threatened to impose upon multiple defendants." *Id.* There is no warrant for this Court to review the Ninth Circuit's ruling that the amount of Rule 11 sanctions imposed by the district court was not an abuse of discretion. App. A11, A16.

Alioto nonetheless attempts to manufacture an important issue of federal law by asserting that to violate Rule 11, a pleading must be found to be wholly "frivolous" or in furtherance of an improper purpose. Alioto Pet. at 12. Rule 11 says no such thing, and as the Advisory Committee Notes expressly state, amended Rule 11 "stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule." Nor does the case law so construe the Rule: the term "frivolous" is used either as a shorthand term to encompass Rule 11's three separate commands — "well grounded in fact," "warranted by existing law" and not interposed for an improper purpose, *see, e.g., Zaldivar*, 780 F.2d at 831 & n.7 — or to deal with the quite separate problem, not at issue here, of when an attorney may be sanctioned under the "warranted by existing law" clause of Rule 11. Indeed, all of the cases cited by Alioto involving the so-called "frivolousness" standard, *see* Alioto Pet. at 11-12 n.1, involve the "warranted by existing law" clause of Rule 11. None denies a lawyer's independent obligation under the Rule to reasonably inquire into whether a pleading is "well grounded in fact." *See, e.g., Westmoreland*, 770 F.2d at 1174.

Alioto also asserts three general controversies about the policy implications of judicial application of Rule 11. If these controversies exist, they have no relevance here.

First, Alioto argues that Rule 11 may chill effective advocacy. Alioto Pet. at 21-23, 26. But the "well grounded in fact" clause of Rule 11 — unlike the "warranted by existing law" clause — carries no potential for chilling advocacy. It merely requires adequate factual investigation prior to assertion of claims. Not surprisingly, all of the cases cited by Alioto which discuss Rule 11's potential

"chilling effects" were decided under the Rule's separate "warranted by existing law" clause.[7]

Second, Alioto argues that the imposition of Rule 11 sanctions wrongfully penalized its corrective action. Alioto Pet. at 19-21. But this case does *not* raise any issue of whether corrective action may limit imposition of Rule 11 sanctions. Alioto simply mischaracterizes the grounds for the award of sanctions by claiming that "the court concluded, *based on the voluntary dismissal*, that the class aspects of the complaint were nonmeritorious when it was filed." *Id.* at 15 (emphasis in original). Sanctions were imposed because of Alioto's failure to conduct a reasonable inquiry before filing the complaint, which resulted in the filing of allegations not "well grounded in fact," not because of the motion for voluntary dismissal (which in any event was for dismissal *without* prejudice). Moreover, as Judge Rymer expressly found, Alioto did not take any corrective action. Its actions were the opposite of corrective, and included: (1) an improper attempt to disengage without cause from class discovery; (2) an improper attempt to dismiss the class allegations without court approval; and (3) an effort to dismiss the class allegations *without* prejudice. App. A3-A5, B3-B7, B9-B10, C1-C3, C5-C6.[8]

---

[7]The commentary recognizes that the "well grounded in fact" clause has the potential to chill advocacy *only* if interpreted to require attorneys, prior to filing claims, to research facts that cannot be known without extensive discovery prior to the filing of a complaint. *See, e.g.*, Nelkin, *Sanctions Under Amended Rule 11 — Some "Chilling Problems" in the Struggle Between Compensation and Punishment*, 74 Geo. L. J. 1313, 1339-41 (1986) (cited in Alioto Pet. at 22-23). This case did not impose any such requirement.

[8]Alioto cites two Fifth Circuit cases for the proposition that voluntary dismissals of claims preclude Rule 11 sanctions. Alioto Pet. at 19-20, citing *Thomas v. Capital Securities Services, Inc.*, 812 F.2d 984 (5th Cir. 1987), and *Southern Leasing Partners, Ltd. v. McMullan*,

Finally, Alioto argues that the Rule 11 sanctions will serve their deterrent purpose only if imposed following a warning to the offending lawyer. Alioto Pet. at 20-21. The Rule contains no such requirement.[9] Moreover, this case does not raise the notice issue: with regard to its "well grounded in fact" requirement, the Rule is clear, precise and plainly sufficient to have put Alioto on notice. Sophisticated class action attorneys — like Alioto, App. A12, B5, B8 — should hardly need to be warned that, before filing a major class action complaint, they must take steps to insure that critical shareholder class action allegations are factually accurate with regard to the named class representative, and to investigate, in the face of a clear potential conflict of interest, to insure that a named shareholder class representative is both independent from corporate management and can satisfy the requirements of Rule 23(a). App. A12-A14, B8.[10]

---

801 F.2d 783 (5th Cir. 1986). But the cases do not so hold. Rather, they stand for the proposition that the duty to continually review and reevaluate the adequacy of a pleading "*originally supported by an adequate inquiry*" is met if an attorney voluntarily dismisses *with prejudice* what turns out to be a groundless claim. *Thomas,* 812 F.2d at 988-89 (emphasis added); *see also Southern Leasing,* 801 F.2d at 788. In this case, there was no adequate pre-filing inquiry, and Alioto only sought dismissal of the relevant claims without prejudice.

[9]The Advisory Committee Notes to Rule 11 themselves reject any absolute "warning" requirement, leaving the timing of sanctions to the discretion of the district court. "The time when sanctions are to be imposed rests in the discretion of the trial judge." Alioto's reliance on *In re Matter of Yagman,* 796 F.2d 1165, *rehearing denied and amended,* 803 F.2d 1085 (9th Cir. 1986), *see* Alioto Pet. at 20, as establishing a warning requirement is misplaced. *Yagman* recognizes that in cases involving the "well grounded in fact" clause of Rule 11, it may in some circumstances be impractical to require the court to give early notice that sanctions might be imposed. 796 F.2d at 1183.

[10]Nor, as the record reflects, would any warning to Alioto here have had any effect. As the district court found, Alioto persisted in failing

2. There is no conflict among the circuits on any Rule 11 issue in this case.

To justify review, Alioto identifies six purported conflicts among the circuits on Rule 11 issues which, it asserts, are raised by this case. Alioto Pet. at 24-25. All are either illusory or irrelevant to this case, or both.

First, Alioto asserts a conflict in that some circuits ostensibly still apply the "bad faith standard," which governed Rule 11 cases prior to its amendment in 1983, rather than the post-amendment "objective standard." Alioto Pet. at 24. The issue is irrelevant: the Ninth Circuit here applied the proper objective standard. *See* App. A11, B8. And in fact, all circuits now apply that standard. *See, e.g., Eastway Construction Co. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) ("*Eastway*"); *Lieb v. Topstone Industries*, 788 F.2d 151, 157 (3d Cir. 1986) ("*Lieb*"); *Stevens v. Lawyers Mutual Liability Insurance Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986) ("*Stevens*"); *Robinson v. National Cash Register*, 808 F.2d 1119, 1127 (5th Cir. 1987) ("*Robinson*"); *Albright*, 788 F.2d at 1221; *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985); *Zaldivar*, 780 F.2d at 829; *Westmoreland*, 770 F.2d at 1177.[11]

---

to take corrective action, instead compounding his misconduct. App. A3-A5, B3-B-5, B7, B9-B10, C1-C3, C5-C6. Moreover, Alioto to this day denies any wrongdoing.

[11]The cases cited by Alioto do not demonstrate the contrary. *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000 (7th Cir. 1984), was decided under the pre-amendment Rule 11. *See Frazier*, 771 F.2d at 265 n.4. In *McLaughlin v. Bradlee*, 602 F. Supp. 1412 (D.D.C. 1985), *aff'd*, 803 F.2d 1197 (D.C. Cir. 1986), the district court opined that the amended version of Rule 11 might not require bad faith, but did not reach the issue because it found that bad faith did exist in that case. 602 F. Supp. at 1417 n.6. As *Westmoreland* indicates, the District of Columbia Circuit now applies the objective standard.

Second, Alioto asserts a conflict with respect to the standard of review in Rule 11 cases. Alioto Pet. at 24. This purported conflict is irrelevant, because (even by Alioto's own account, *id.*) in this case the Ninth Circuit applied the most searching standard of review. App. A11. Moreover, there is no conflict: the circuits apply the same standard of review. *See Robinson*, 808 F.2d at 1126 & nn. 12, 13 (explaining the harmony among the circuits; apparent differences in standards reflect only refinements in the level of analysis).

Third, Alioto asserts a conflict over whether imposition of Rule 11 sanctions is mandatory. Alioto Pet. at 24. There is no conflict: the circuits agree that Rule 11 mandates the imposition of sanctions whenever a violation is found, but allow the district courts substantial discretion to determine the nature and extent of the sanctions. *See, e.g., Eastway*, 762 F.2d at 254 n.7; *Lieb*, 788 F.2d at 157; *Robinson*, 808 F.2d at 1130-31; *Albright*, 788 F.2d at 1222; *Zaldivar*, 780 F.2d at 831; *Westmoreland*, 770 F.2d at 1174. Indeed, the language of Rule 11 unambiguously so requires: "the court . . . shall impose . . . an appropriate sanction."[12]

Fourth, Alioto asserts a conflict over whether Rule 11 warrants imposition of sanctions for attorneys' ethical transgressions. Alioto Pet. at 25. This purported conflict is irrelevant because Alioto was not here sanctioned for violation of ethical obligations. Rather, Alioto was sanctioned for failing so much as to interview Zelezny and, as the Ninth Circuit stated, for violation of its Rule 11 "duty . . . to conduct a reasonable inquiry into whether [it] . . .

---

[12]Alioto cites *Lieb* as to the contrary. But as *Lieb* stated: "The use of 'shall' [in amended Rule 11] was deliberate and considered . . . . Although trial judges still retain substantial discretion, its exercise is directed more to the nature and extent of sanctions than to initial imposition." 788 F.2d at 157, citing *Westmoreland*, 770 F.2d at 1174.

should bring the class claims in the face of the potential conflict of interest." App. A14; *see* App. B8. Indeed, the Ninth Circuit's position on this issue is favorable to Alioto: in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1539 (9th Cir. 1986), *rehearing and rehearing en banc denied*, 809 F.2d 584 (9th Cir. 1987) ("*Golden Eagle*"), the Ninth Circuit held that Rule 11 does not require "courts to enforce ethical standards of advocacy *beyond the terms of the rule itself*" (emphasis added). This case follows that rule. Moreover, there is no conflict: while Alioto cites *Blackwell v. Department of Offender Rehabilitation*, 807 F.2d 914 (11th Cir. 1987), the Eleventh Circuit there did not hold that lawyers may be sanctioned under Rule 11 on the basis of ethical standards drawn from beyond the rule itself.

Fifth, Alioto correctly notes that there may be a conflict on whether Rule 11 imposes a continuing obligation to refine papers originally properly filed in light of new circumstances. Alioto Pet. at 25. *Compare Thomas v. Capital Security Services, Inc.*, 812 F.2d 984, 988 & n.2 (5th Cir. 1987) (there is such an obligation) *with Oliveri v. Thompson*, 803 F.2d 1265, 1274-75 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987) ("*Oliveri*") (there is no such obligation). However, this possible conflict is irrelevant: Rule 11 sanctions were imposed here not based on Alioto's failure to correct a pleading originally filed in compliance with the Rule, but rather on its filing of a complaint which was never in compliance with the Rule.

Finally, Alioto contends there is a conflict on the issue of whether "an attorney can be sanctioned where a *portion* of the pleading is nonfrivolous." Alioto Pet. at 25 (emphasis in original). In fact, the circuits agree that Rule 11 sanctions may be appropriate even if part of a pleading has merit. *Quiros v. Hernandez Colon*, 800 F.2d 1, 2-3 (1st Cir. 1986); *Oliveri*, 803 F.2d at 1280; *Albright*, 788 F.2d at

1220-21. Indeed, Alioto concedes there is no conflict among the circuits, because the only purportedly contrary case it cites, *Golden Eagle*, is from the Ninth Circuit.[13]

Certiorari should be denied on the Rule 11 issue in No. 86-1918.

B. REVIEW SHOULD BE DENIED IN NO. 86-1894 AND NO. 86-1918 BECAUSE THE RULING THAT THE RULE 41(a)(2) CONDITIONS IN THIS CASE ARE NOT APPEALABLE RAISES NO IMPORTANT QUESTIONS OF FEDERAL LAW AND INVOLVES NO CONFLICT AMONG THE CIRCUITS.

The Ninth Circuit's ruling that the Rule 41(a)(2) conditions here are not appealable does not merit review by this Court: it involves no important issues of federal law, and is not a matter on which there is a conflict among the circuits relevant to this case.

---

[13]An intra-circuit conflict is not a ground for review by this Court. *See* Rule 17.1. Moreover, in denying petitions for rehearing *en banc* in both this case and in *Golden Eagle* — the purportedly conflicting case cited by Alioto, *see* Alioto Pet. at 25 — the Ninth Circuit properly recognized that the two cases are not in conflict. In *Golden Eagle*, which unlike this case involved the "warranted by existing law" clause of Rule 11, the Ninth Circuit drew a distinction for Rule 11 purposes between pleadings, motions and papers on the one hand, and the arguments supporting pleadings, motions and papers on the other hand. *Golden Eagle* held that Rule 11 permits imposition of sanctions, in the context of motions, only where the motion itself is not warranted by existing law, not where one of the arguments advanced in support of the motion is unwarranted. 801 F.2d at 1540. *Golden Eagle* did not involve, as does this case, the "well grounded in fact" clause of Rule 11; nor does it hold or suggest that Rule 11 sanctions are inappropriate where a portion of a pleading, rather than merely a portion of the supporting argument, is asserted in violation of the Rule. *Id.*

Contrary to petitioners' argument, *see* Alioto Pet. at 27, Barton Pet. at 13, the Rule 41(a)(2) conditions imposed here are neither extraordinary nor unusual. Rule 41(a)(2) provides, in relevant part, that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and *upon such terms and conditions as the court deems proper.*" (Emphasis added.) One condition frequently imposed where, as here, plaintiff seeks a dismissal without prejudice — *i.e.,* where plaintiff seeks to deprive defendant of an adjudication on the merits and preserve its option to sue defendant again — is to condition the dismissal upon plaintiff's payment of the defendant's costs and attorneys' fees. The condition is imposed without regard to plaintiff's or its counsel's good or bad faith, the merits of the pleadings, or any conduct or misconduct of counsel. Fees are awarded to compensate defendants for the work rendered useless by the denial of an opportunity to obtain a favorable adjudication on the merits. *See, e.g., G.A.F. Corp. v. Transamerica Insurance Co.*, 665 F.2d 364, 367 (D.C. Cir. 1981) ("*G.A.F. Corp.*"); *McLaughlin v. Cheshire*, 676 F.2d 855, 856-57 (D.C. Cir. 1982) ("*McLaughlin*"). Plaintiffs against whom such conditions are imposed do not suffer legal prejudice because they are free to pursue their claims in another action or, if they elect not to satisfy the conditions, to withdraw their motion for voluntary dismissal. *See* App. A6-A8; *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-31 (9th Cir. 1986) ("*Lau*"); *G.A.F. Corp.*, 665 F.2d at 367-68.

1. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not raise any important questions of federal law.

Petitioners argue that the Ninth Circuit's non-appealability ruling raises an important issue of federal law — indeed, a due process issue — because they ostensibly

have wrongfully been deprived of appellate review. Alioto Pet. at 27-28; Barton Pet. at 11. This argument ignores the options available to petitioners in the district court: (1) to acquiesce in the conditions by failing to withdraw their motion for voluntary dismissal; (2) to forego the conditions by withdrawing the motion and pursuing their claims; or (3) to withdraw the motion for dismissal without prejudice, take a dismissal with prejudice, and obtain review of the conditions on appeal from the dismissal with prejudice. *See* App. A6-A7; *Lau,* 792 F.2d at 930-31; *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 131 n.13 *rehearing denied*, 582 F.2d 982, 983 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979) ("*Yoffe*"). As the Ninth Circuit found, petitioners were "plainly aware of their option to withdraw the motion for voluntary dismissal," yet elected to acquiesce in the conditions by not doing so. App. A7.[14] Moreover, the Ninth Circuit explicitly recognized petitioners' right to seek review by way of a petition for writ of mandamus. App. A10.

Barton also argues that the non-appealability ruling raises an important issue of federal law because, despite the ruling, the Ninth Circuit in fact necessarily determined the propriety of the conditions by affirming the award of Rule 11 sanctions against Alioto. Barton Pet. at 11. This argument simply mischaracterizes the rulings below. The award of Rule 11 sanctions was wholly independent of the Rule 41(a)(2) conditions: whether or not

---

[14]As the Ninth Circuit noted: "In their reply memorandum opposing . . . [respondents'] request for [R]ule 41(a)(2) conditions, they [petitioners] explicitly spelled out this option, citing as authority the very District of Columbia case that *Lau* follows." App. A7. Moreover, despite their self-professed reliance on cases ostensibly holding Rule 41(a)(2) conditions appealable, *see* Alioto Pet. at 27, in that very reply memorandum petitioners cited *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976) which stated that Rule 41(a)(2) attorneys' fees conditions are *not* appealable. *Id.* at 603. *See also* note 15 below.

the conditions are valid, Alioto remains obligated to pay the full amount in Rule 11 sanctions. The district court only provided that Alioto's Rule 11 sanctions obligation would be reduced by any payments actually made by petitioners pursuant to the Rule 41(a)(2) conditions to avoid duplicative payments to respondents. *See* App. A5, B11; Barton App. D3.

2. The ruling that the Rule 41(a)(2) conditions in this case are not appealable does not involve a conflict among the circuits.

Petitioners argue that there is a conflict among the circuits on the Rule 41(a)(2) appealability issue. While there is some difference in approach among the circuits as to the mechanism, if any, by which Rule 41(a)(2) attorneys' fees conditions may be reviewed, that difference is one of form, not substance, and moreover is not relevant here. All of the circuits which have considered the issue have concluded that absent a showing of legal prejudice resulting from the conditions — a prerequisite not satisfied by conditions, as here, requiring payment of defendants' fees for work in defending claims which will not be useful if the claims are reasserted — Rule 41(a)(2) conditions are not appealable.[15] App. A10-A11; *Yoffe*, 580 F.2d at 131; *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976); *Scholl v. Felmont Oil Corp.*, 327 F.2d 697 (6th Cir. 1964); *Bowers v. St. Louis Sw. Ry. Co.*, 668 F.2d 369 (8th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982).

It is true that the Fifth Circuit recognizes an exception to this rule by allowing appeals from conditions that a

---

[15]Alioto argues that it relied on *G.A.F. Corp.* and *McLaughlin* for the proposition that Rule 41(a)(2) attorneys' fees conditions are appealable. Alioto Pet. at 27. While the District of Columbia Circuit did entertain appeals involving such conditions in those cases, it did not address the appealability issue.

plaintiff pay a defendant's attorneys' fees if the amount of the fees is "clearly" or "patently unreasonable," *and* the plaintiff has not acquiesced in the conditions. *Yoffe*, 580 F.2d at 130-31. But this does not create a conflict: the Ninth Circuit also permits review under these circumstances, through a petition for writ of mandamus. App. A10. No circuit permits review where, as here, the plaintiff has acquiesced in the conditions, App. A6-A7, and the fees condition is not patently unreasonable. App. A10, A16.[16]

Certiorari should be denied in No. 86-1894 and in No. 86-1918 as to the Rule 41(a)(2) non-appealability issue.

---

[16]Contrary to petitioners' assertions, the Rule 41(a)(2) conditions here were in no sense patently unreasonable. As the Ninth Circuit found, the admittedly substantial fees incurred by respondents must be viewed in light of the massive liability threatened by plaintiffs' class action complaint. App. A16. Moreover, the district court set the amount of fees only after lengthy proceedings and formal findings by the magistrate. App. A5, B10-B11; Barton App. D1-D4; *see also* App. A16. Fees were awarded *only* for respondents' costs of defending against the claims which were dismissed without prejudice — the class action claims — and not for respondents' work in securing imposition of the conditions or in documenting the amount of fees to be awarded. App. B6, B11. *See also* note 6 above. Alioto's argument that the district court improperly awarded fees for defense work which would prove useful in respondents' defense of Unioil's and Richards' remaining individual claims (Alioto Pet. at 27-28) is not only unsupported by the record, but deliberately neglects to advise this Court that Unioil's and Richards' remaining claims were dismissed with prejudice for failure to prosecute. App. A5.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petitions for Writs of Certiorari in No. 86-1918 and No. 86-1894 be denied.

Dated: July 24, 1987

Respectfully submitted,

C. STEPHEN HOWARD
Counsel of Record
WAYNE STEPHEN BRAVEMAN
SUSAN L. HOFFMAN
TUTTLE & TAYLOR
INCORPORATED
Attorneys for Respondent Donaldson, Lufkin & Jenrette Securities Corporation

BEN SUTER
TERRY ROSS
KEESAL, YOUNG & LOGAN
Attorneys for Respondents Shearson/American Express, Inc. and Oppenheimer & Co., Inc.

C. G. GORDON MARTIN
PAUL A. RICHLER
JUDITH K. OTAMURA-KESTER
MORGAN, LEWIS & BOCKIUS
Attorneys for Respondents E. F. Hutton & Co., Inc., Richard Jacoby and Haim Pekalis

FRANK KAPLAN
ALSCHULER, GROSSMAN & PINES
Attorneys for Respondents Kurt Feshbach and Stockbridge Partners, Inc.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 24, 1987, I served the within BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI in re: "Alioto & Alioto vs E. F. Hutton & Co., Inc." in the United States Supreme Court, October Term 1987, Nos. 86-1918 and 86-1894;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

CLERK, UNITED STATES
COURT OF APPEALS
NINTH JUDICIAL CIRCUIT
Seventh & Mission Streets
P. O. Box 547
San Francisco, California 94101

CLERK, UNITED STATES
DISTRICT COURT,
CENTRAL DISTRICT OF
CALIFORNIA for the
Hon. Pamela A. Rymer
312 N. Spring Street
Los Angeles, California 90012

JOSEPH L. ALIOTO
ALIOTO & ALIOTO
650 California Street
23rd Floor
San Francisco, California 94108

DUANE S. MUSFELT
SHARON S. CHANDLER
LEWIS, D'AMATO, BRISBOIS
& BISGAARD
601 California Street
Suite 1900
San Francisco, California 94108

ROY G. WEATHERUP
ROBERT L. KAUFMAN
HAIGHT, DICKSON, BROWN
& BONESTEEL
201 Santa Monica Boulevard
P. O. Box 680
Santa Monica, California 90406

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 24, 1987, at Los Angeles, California

CE CE MEDINA

Supreme Court, U.S.
FILED
AUG 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1894

In the Supreme Court of the United States

October Term, 1986

DONALD A. BARTON,

Petitioner,

v.

E. F. HUTTON & CO., INC.; KURT FESHBACH; STOCKBRIDGE PARTNERS, INC.; RICHARD JACOBY; HAIM PEKELIS; SHEARSON-AMERICAN EXPRESS, INC.; GOLDMAN SACHS & CO.; and DONALDSON, LUFKIN & JENRETTE SECURITIES CORP.,

Respondents.

REPLY BRIEF OF PETITIONER DONALD A. BARTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HAIGHT, DICKSON, BROWN & BONESTEEL,
ROY G. WEATHERUP, and
ROBERT L. KAUFMAN
201 Santa Monica Boulevard
Post Office Box 680
Santa Monica, California 90406
Telephone: (213) 458-1000

Attorneys for Petitioner
DONALD A. BARTON

Westside Law Publishers Los Angeles, California (213) 477-0491

TOPICAL INDEX

Page

I.

The Respondents' Speculation and Conjecture in their Opposition Brief, Regarding the Plaintiffs' Motivations for Filing the Complaint, Lack Any Support in the Record, and Should be Disregarded by this Court 2

II.

Respondents Have Completely Failed to Address the Legal Prejudice Suffered by Mr. Barton When the Ninth Circuit Held that the Reimbursement Award Was Not Appealable 3

III.

Conclusion 6

TABLE OF AUTHORITIES CITED

Cases Page

American Airways Charters, Inc. v. Regan, 746 F.2d 865 (D.C. Cir. 1984) 5
Helstowski v. Meanor, 442 U.S. 500 (1979) 5
Holt v. Pitts, 619 F.2d 558 (6th Cir. 1984) 5
Lau v. Glendora Unified School District, 792 F.2d 929 (9th Cir. 1986) 4
Yoffe v. Keller Industries, Inc., 580 F.2d 126, *rehearing denied*, 582 F.2d 982 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979) 4

Rules

Federal Rules of Civil Procedure
Rule 41(a)(2) 3, 4, 6
District Court Rules
Rule 11 ..... 3, 5, 6

Other Authorities

Joseph, *The Trouble with Rule 11*, 73 A.B.A. J. 87, 88-90 (August, 1987) 6

No. 86-1894

In the Supreme Court of the United States

October Term, 1986

DONALD A. BARTON,

Petitioner,

v.

E. F. HUTTON & CO., INC.; KURT FESHBACH; STOCKBRIDGE PARTNERS, INC.; RICHARD JACOBY; HAIM PEKELIS; SHEARSON-AMERICAN EXPRESS, INC.; GOLDMAN SACHS & CO.; and DONALDSON, LUFKIN & JENRETTE SECURITIES CORP.,

Respondents.

REPLY BRIEF OF PETITIONER DONALD A. BARTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Donald A. Barton, hereby replies to the joint and consolidated brief of respondents in opposition to his petition for writ of certiorari as follows:

I.

The Respondents' Speculation and Conjecture in their Opposition Brief, Regarding the Plaintiffs' Motivations for Filing the Complaint, Lack Any Support in the Record, and Should be Disregarded by this Court.

In their opposition brief, the respondents have made "factual" contentions regarding the plaintiffs' purpose and motivation for filing the complaint which are not only devoid of any support in the record, but utterly irrelevant to any discussion of the issues presented in the petitions for writ of certiorari filed by Mr. Barton and Mr. Alioto. Accordingly, petitioner is compelled to alert this court to some of the unsupported factual statements made by the respondents.

In their brief, the respondents assert that the rise in Unioil's publicly trade stock in 1983 was "fueled by a series of optimistic public announcements by the company." [Respondents brief ("R.B.") at p. 3.] Respondents further claim that Unioil's issuance of a press release prior to filing the complaint in this action "appears to have been an effort to forestall" the "highly likely" shareholder class action suits against Unioil which were later filed. [R.B. at pp. 3-4.] These statements are mere speculation and conjecture, without any support whatsoever in the record.[1] The respondents made these

---

[1] Respondents also refer to the sanctions awarded by the magistrate when he ordered the deposition of Mark Zelezny to resume. The Ninth Circuit did not mention the sanctions in its opinion, and those sanctions were never an issue in the proceedings below. Those sanctions were assessed for conduct separate from that which is the subject of this petition. It is clear that respondents' reference to those sanctions is gratuitous and presented to distract this court from the real issues before it.

unfounded assertions before, and they were disregarded by the District Court and the Ninth Circuit. Even though these contentions have no relation to the issues as framed in the opinion below and petitions for writ of certiorari, the respondents have raised them again, apparently for no other purpose than for *ad hominem* argument.

II.

Respondents Have Completely Failed to Address the Legal Prejudice Suffered by Mr. Barton When the Ninth Circuit Held that the Reimbursement Award Was Not Appealable.

In their brief, respondents simply brush aside the clear legal prejudice suffered by Mr. Barton as a result of the Ninth Circuit's decision that the reimbursement award was not appealable. As explained in Mr. Barton's petition for writ of certiorari, the Rule 11 sanctions award was inextricably intertwined with the reimbursement award under Rule 41(a)(2) of the *Federal Rules of Civil Procedure*. When the Ninth Circuit affirmed the sanctions award, it also passed judgment on the amount of and the appropriateness of the reimbursement award, which comprised $165,774.84 of the total award of sanctions against the Alioto firm.

Respondents mischaracterized Mr. Barton's argument about the legal prejudice suffered by Mr. Barton in this case. They contended that legal prejudice does not arise from the condition requiring payment of defendants' fees. Mr. Barton's assertion of legal prejudice is founded on his denial of review from the District Court's reimbursement award. Any question of whether the reimbursement amount in that order was patently unreasonable or related to work which was "rendered useless" is an issue for an appeal from the merits of the reimbursement award by Mr. Barton and the

plaintiffs, a review which they have been effectively denied by the Ninth Circuit. Respondents are simply unresponsive to the real issue of legal prejudice presented to this court, the denial of any opportunity for Mr. Barton to be heard.

Respondents contend that the plaintiffs and Mr. Barton had several "options" available to them, citing *Lau v. Glendora Unified School District*, 792 F.2d 929, 930-931 (9th Cir. 1986), and *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 131 at fn. 13, *rehearing denied*, 582 F.2d 982, 983 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979). These "options" are chimerical. The plaintiffs could not withdraw the motion and pursue their class action claims in light of the District Court's ruling on the inappropriateness of the class. To require the plaintiffs to make a motion for dismissal without prejudice, and take a dismissal with prejudice in order to appeal, is too harsh a rule to apply in every case. The supposed "acquiescence" which the respondents assert took place when the plaintiffs failed to withdraw the motion for voluntary dismissal was not an "acquiescence" at all, because the plaintiffs immediately filed a notice of appeal from the reimbursement award.

All of the arguments presented by respondents dematerialize under scrutiny. The supposed "options" recited by the respondents apply only to the plaintiffs in the action. An attorney, like Mr. Barton, who is also subject to a Rule 41(a)(2) reimbursement order, cannot make an independent decision regarding these supposed "options." That decision belongs only to the party plaintiff which retains the attorney. In this case, Mr. Barton is no longer representing the plaintiffs at all. The respondents and the Court of Appeals were fully aware that Mr. Barton had ceased representing Heck

& Heck, Inc., Heck Oil, Inc., and Mark Zelezny by the time that the notice of appeal to the Ninth Circuit was filed. Thus, any discussion about various options available under *Lau* has no application to Mr. Barton. He, personally, had no options to exercise other than an appeal. For all intents and purposes, the judgment was final as to him.

The Ninth Circuit has held that an appeal by Mr. Barton concurrent with the appeal from the Rule 11 sanctions is premature. When it ruled on the sanctions appeal, however, the court affirmed both the propriety and the amount of the reimbursement award, and set forth the law of the case, rendering moot any later appeal by Mr. Barton. In creating this "Catch-22,"[2] the Ninth Circuit deafened the ears of the courts to Mr. Barton's pleas for a meaningful review of the reimbursement award.

As set forth in Mr. Barton's petition for review, mandamus is a completely inadequate and inappropriate remedy. If mandamus is denied, a party or an attorney in Mr. Barton's position would have their rights conclusively determined in their absence. If mandamus is granted to those affected by a reimbursement order which is intertwined with a Rule 11 sanction, then those named in the Rule 11 sanctions would be prejudiced. A mandamus proceeding typically proceeds more quickly than an appeal, and those appealing from the award of sanctions could have no standing to take part in the mandamus proceeding. The sanctions award

---

[2]See *Helstowski v. Meanor*, 442 U.S. 500, 509 (1979) (Brennan, J., dissenting); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 876 (D.C. Cir. 1984) (Greene, D.J., concurring); *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1984).

would be considered final as to them, and thus not appropriate for mandamus, according to the Ninth Circuit's opinion in this case. Only a holding by this court, that all those effected by hybrid awards can appeal at the same time, would prevent such anomalies.

III.

Conclusion.

Legal prejudice is inherent in a hybrid Rule 11 and Rule 41(a)(2) order which permits appeal by some, but not all, of those affected by it, where the appeal will necessarily determine the rights of all. This case presents this court with important questions about the limits of the use of Rule 11 sanctions. A novel application of Rule 11 by the District Court, coupled with the Ninth Circuit's holding that Mr. Barton could not appeal from the Rule 41(a)(2) reimbursement portion of the District Court's order, has denied him any meaningful review of the reimbursement award.

Since its amendment in 1983, Rule 11 has been the subject of more than 1,000 decisions, and is the cause of great concern in the federal bar. Joseph, *The Trouble with Rule 11*, 73 A.B.A. J. 87, 88-90 (August, 1987). As shown by the procedural history of the present case, Rule 11 sanctions are being granted in a wide variety of forms. Mr. Barton and the plaintiffs have been prejudiced by the Rule 11 sanctions award which is ostensibly aimed only at the Alioto firm. If injustice of this type is to be avoided in the future, this court must rule that orders presented in combination with Rule 11 sanctions can be appealed alongside them. For all the above reasons, petitioner Donald A. Barton respectfully requests that this court grant his petition for a writ of certiorari in this case.

Respectfully submitted,

HAIGHT, DICKSON, BROWN & BONESTEEL
ROY G. WEATHERUP, and
ROBERT L. KAUFMAN
Attorneys for Petitioner
DONALD A. BARTON

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 7, 1987, I served the within *Reply Brief of Petitioner Donald A. Barton in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Clerk, California Court
of Appeals
Ninth Judicial Circuit
Seventh & Mission Streets
P.O. Box 547
San Francisco,
California 94101

Clerk of the United States
District Court for
the Hon. Pamela A. Rymer
34 Civic Center Plaza
Room 111
Santa Ana, California 97201

Terry Ross, Esq.
Ben Suter, Esq.
Keesel, Young & Logan
Pier F - Berth 203
P.O. Box 1730
Long Beach, California 90801

Tracy R. Kirkham, Esq.
Hennigan & Mercer
611 W. 6th Street
28th Floor
Los Angeles, California 90017

Mr. Melvin Lloyd Richards
In Pro Per
c/o Unioil, Inc.
5635 San Fernando Road
Glendale, California 91202

Frank Kaplan, Esq.
Alschuler, Grossman & Pines
1880 Century Park East
12th Floor
Los Angeles, California 90067

Joseph L. Alioto, Esq.
Alioto & Alioto
650 California Street
23rd Floor
San Francisco,
California 94108

H. Donald Harris, Jr., Esq.
Lillick, McHose & Charles
Two Embarcadero Center
Suite 2600
San Francisco,
California 94111

Michael London, Esq.
Henderson, Robers, Schefield
& Henderson
P.O. Box 22257
Santa Barbara,
California 93121

C. Stephen Howard, Esq.
Wayne Braveman, Esq.
Susan L. Hoffman, Esq.
Tuttle & Taylor
609 South Grand Avenue
Los Angeles, California 90017

Judith K. Otamura-Kester,
Esq.
Morgan, Lewis & Bockius
Counselors at Law
801 South Grand Avenue
Los Angeles,
California 90017-3189

Duane S. Musfelt
Sharon S. Chandler
Lewis, D'Amato, Brisbois
& Bisgaard
601 California Street
Suite 1900
San Francisco,
California 94108

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 7, 1987, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)